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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 276.

WILLIAM BYBEE, PLAINTIFF IN ERROR,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 22, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1890.

1 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To the Oregon and California Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein William Bybee is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this September 28, 1887.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 1167. U. S. circuit court, district of Oregon. Wm. Bybee *vs.* Oregon and California Railroad Co. Citation on writ of error. Filed Sept. 29, 1887. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

UNITED STATES OF AMERICA, }
State of Oregon. }

We hereby acknowledge due service upon us of the within citation on this 28 Sep., 1887.

WHALLEY, BRONAUGH & NORTHUP,
Att'ys for Defendant.

2 In the Supreme Court of the United States.

WILLIAM BYBEE
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY. } No. 1167. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before the Honorable Matthew P. Deady, one of you, between William Bybee, plaintiff and plaintiff in error, and The Oregon and California Railroad Company, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do com-

mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred and eighty-seven, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this September 28, 1887.

Seal United States Circuit Court, Oregon.

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. William Bybee *vs.* The Oregon and California Railroad Company. Writ of error. Filed September 28, 1887. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

3 In the Supreme Court of the United States.

WILLIAM BYBEE
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY. } No. 1167. Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is the said circuit court, before the Honorable Matthew P. Deady, one of you, between William Bybee, plaintiff and plaintiff in error, and The Oregon and California Railroad Company, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. eighteen hundred

and eighty-seven, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this September 28, 1887.

[Seal of U. S. Circuit Court for Oregon.]

R. H. LAMSON,
Clerk of the Circuit Court of the United States for the District of Oregon,
By R. B. LAMSON,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. William Bybee *vs.* The Oregon and California Railroad Company. Writ of error. (Endorsed:) Filed September 28, 1887. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

4 In the Circuit Court of the United States for the District of Oregon. October Term, 1885.

Be it remembered that on the 17th day of October, 1885, there was duly filed in the circuit court of the United States for the district of Oregon a transcript of record from Jackson county, Oregon, in words and figures as follows, to wit:

5 In the Circuit Court of the State of Oregon for Jackson County.

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.

Now, at this day, comes the defendant above named and petitions the above-named honorable court for an order removing this cause into the circuit court of the United States for the district of Oregon for trial, and for cause of such removal your petitioner represents that, as appears from the complaint and answer filed herein, the matter in dispute in this action exceeds, exclusive of costs, the sum or value of five hundred dollars and arises under laws of the United States, in this, that the defendant claims the right of way, by grant from the United States, over the ground occupied by that portion of the water ditch alleged in the complaint to have been injured and destroyed by defendant, while plaintiff asserts the right to occupy said ground with said ditch under the mining laws of the United States.

WHALLEY, BRONAUGH,
NORTHRUP, DEADY &
P. P. PRIM,
Att'ys for Defendant.

STATE OF OREGON, } ss:
Multnomah County, }

I, Walt W. Bretherton, being duly sworn, say on oath that I am secretary of the above-named defendant, The Oregon and California Railroad Company, and that the statements made and contained in the foregoing petition are true as I verily believe.

WALT W. BRETHERTON.

Subscribed and sworn to before me this 21st day of September, 1885.

[L. S.] F. G. EWARD.

Endorsed: Filed Oct. 5th, 1885. W. H. Parker, clerk.

6 In the Circuit Court of the State of Oregon for Jackson County.

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.

Whereas the defendant in the above-entitled action at law is about to petition the above-named honorable court for the removal of said cause into the circuit court of the United States for the district of Oregon for trial:

Now, therefore, know all men by these presents that the said Oregon and California Railroad Company, as principal, and R. Koehler and R. P. Earhart, as sureties, are hereby held and firmly bound unto said plaintiff, William Bybee, and unto whom it may concern in the sum of one thousand dollars, lawful money of the United States, conditioned that if the Oregon and California Railroad Company shall enter in the said circuit — of the United States for the district of Oregon on the first day of its next session after the filing of said petition in said State court a copy of the record in said above-entitled action at law, and shall pay all costs that may be awarded by the said United States circuit court if said court shall hold that said action at law was wrongfully and improperly removed thereto, then this obligation shall be void.

In witness whereof the said Oregon and California Railroad Company has caused these presents to be signed by its 2nd vice-president and secretary and its corporate seal to be hereunto affixed and the said sureties have hereunto set their hands and seals on this 21st day of September, A. D. 1885.

THE OREGON AND CALIFORNIA RAILROAD CO.,
[L. S.] By GEO. H. ANDREWS,
2nd Vice-President.

7 THE OREGON AND CALIFORNIA RAILROAD COMPANY,
By WALT W. BRETHERTON, *Secretary.*
R. KOEHLER. [SEAL.]
R. P. EARHART. [SEAL.]

STATE OF OREGON,
County of Multnomah, } ss:

I, R. Koehler, and I, R. P. Earhart, being each duly sworn, do each for himself say that I am a resident and freeholder within the State of Oregon and am worth the sum of one thousand dollars above all debts and liabilities and property exempt from execution.

R. KOEHLER.
R. P. EARHART.

Subscribed and sworn to before me this 21st day of September, A. D. 1885.

WALT W. BRETHERTON,
[L. S.] *Notary Public in and for Oregon.*

Endorsed: Filed Oct. 5th, 1885. H. Parker, clerk.

8 In the Circuit Court of the State of Oregon for Jackson County.

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.

The plaintiff complains of the defendant and alleges—

That at and during the dates and times hereinafter stated the defendant was and still is a private incorporation duly incorporated and organized under the laws of the State of Oregon.

That on the 3d day of September, 1883, the plaintiff was the owner in fee of an undivided one-half interest in a certain water ditch and water right connected thereto and used therewith situated on the south side of Rogue river, in Jackson county, Oregon, and in the lawful and peaceable possession of said ditch and water right as a tenant in common therein with Daniel Fisher.

That on said day the plaintiff and said Daniel Fisher, for the consideration of $250 to them paid, duly executed a deed to defendant conveying to it the right to enter upon said water ditch and construct, maintain, and operate its railroad and telegraph line over and across the same, but upon the condition that it should not in any way injure or destroy said water ditch or impair or obstruct the use or enjoyment of said water ditch by the plaintiff or said Daniel Fisher, as a means of conveying the water through or along the same, by any act or acts on its part in constructing, maintaining, or operating its railroad or telegraph line over or across the said water ditch.

That defendant then and there assented to said condition, and thereupon accepted said deed and received possession of said water ditch from the plaintiff and said Daniel Fisher under said
9 deed and upon said condition and entered upon and constructed its said railroad and telegraph line across said water ditch, but in such a manner as to permanently obstruct and destroy the same and render it impossible to convey water through or along

the same at the point where the defendant's said railroad crosses the same, constructed as aforesaid.

And plaintiff alleges that the defendant has ever since the construction of its said railroad and telegraph line across said water ditch as aforesaid and still does retain possession of said water ditch so obtained under said deed and ever since has and still does maintain and operate its said railroad and telegraph line so constructed across the same as to prevent any use of said water ditch for the conveyance of water through or along the same and has wrongfully and unlawfully appropriated the portion of said water ditch where its railroad and telegraph line crosses the same to its own exclusive use and benefit and has refused and still does refuse to pay or make the plaintiff any compensation for his interest therein.

That by reason of said wrongful acts of the defendant the plaintiff's said interest in said water ditch and water right has been destroyed and rendered entirely valueless, and he has been damaged thereby in the sum of seven thousand dollars, for which sum he asks judgment against the defendant, together with his costs and disbursements in this action.

E. B. WATSON AND
H. K. HANNA,
Att'ys for Pl'ff.

STATE OF OREGON, } ss:
County of Jackson, }

I, Wm. Bybee, being duly sworn, say that I am plaintiff in
10 the foregoing action; that I have read the complaint and believe it to be true.

WM. BYBEE.

Sworn and subscribed to before me this 29th day of August, 1885.

[L. S.] CHARLES PRIM,
Notary Public.

Endorsed: Filed Sept. the 7th, 1885. W. H. Parker, clerk.

11 In the Circuit Court of the State of Oregon for the County of Jackson.

WM. BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant. } Summons.

To the Oregon and California Railroad Company, the above-named defendant:

In the name of the State of Oregon, you are hereby required to appear and answer the complaint of the above plaintiff in the above-entitled court within ten days from the date of the service of this summons upon you, if served in Jackson county, Oregon, but if

served in any other county of the State of Oregon, then within twenty days from the date of the service of this summons upon you, and you are hereby notified that if you fail to appear and answer said complaint as hereby required the plaintiff will apply to the court for the relief demanded therein, to wit, for a judgment of seven thousand dollars and costs and disbursements.

E. B. WATSON &
H. K. HANNA,
Attorneys for Plaintiff.

Rec'd Sept. 12th, 1885.

A. S. JACOBS, *Sheriff*,
By N. A. JACOBS, *Deputy*.

STATE OF OREGON, } ss :
County of Jackson, }

I hereby certify that I served the within summons within said county this 12th day of September, 1885, on the within-named Oregon and California Railroad Company by delivering a true copy thereof, certified to by me as sheriff of said county, together with a copy of the complaint, certified to by the clerk of said county,
12 to Charles K. Fronk, railroad agent, at Medford, Oregon, personally.

A. S. JACOBS,
Sheriff of Jackson County, Oregon,
By N. A. JACOBS, *Deputy*.

Endorsed: Filed Sept. 21st, 1885. W. H. Parker, clerk.

Sheriff's fees, $2.93⅓.

13 In the Circuit Court of the State of Oregon for the County of Jackson.

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.

The defendant, for the answer to the complaint of the plaintiff in the above-entitled action, denies that on the third day of September, 1883, or at any other time whatever, either the said plaintiff or the said Daniel Fisher was the owner in fee simple or otherwise of any undivided one-half interest or any interest whatever in any part of that portion of said alleged water ditch or water right mentioned in the complaint and therein alleged to have been injured and destroyed by this defendant, and denies that either plaintiff or said Fisher was in the lawful possession thereof at any time.

Defendant denies that said deed, mentioned in said complaint as having been executed by said plaintiff and said Daniel Fisher to defendant, was executed upon or contained any condition whatever, and denies that defendant ever assented to said alleged or any condition in connection with the execution or delivery of said deed or

otherwise with relation thereto or in connection therewith, or thereupon or otherwise received possession of said water ditch or of any part thereof from the plaintiff and said Daniel Fisher or from either of them, under said deed or otherwise.

Defendant alleges that it has no knowledge or any information sufficient to form a belief as to whether its said railroad and telegraph was or was not constructed in such manner as to permanently obstruct or so as to destroy any part of said water ditch
14 or so as to render it impossible to convey water through or along the same or any part thereof.

Denies that defendant ever obtained or held or retained possession of any portion of the said water ditch under said or any deed, and denies that the maintaining or operating said railroad or telegraph line prevents the use of said water ditch for the conveyance of water through or along the same, and denies that defendant has wrongfully or unlawfully or otherwise appropriated any portion of said water ditch to its own use, and denies that by any wrongful or other act of defendant any interest of plaintiff in said water ditch or water right or in any portion thereof has been destroyed or rendered valueless, or that plaintiff has been thereby or otherwise damaged in any sum of money whatever or otherwise.

And, for further and separate answer and defense to said complaint, defendant alleges that the enterprise, business, pursuit, and occupation for which defendant was incorporated was and is, among other things, to construct, equip, maintain, and operate a railroad and telegraph line, with all the necessary branches, side tracks, fixtures, buildings, depots, stations, and appurtenances, from Portland, in the State of Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue river valleys, to the California line on the southern boundary of Oregon.

That by section three of an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon," approved July 25th, 1866, there was granted to this defendant, among other things, the right of way through the public lands of the United States to the extent of one hundred feet in width on each side of said railroad where it may pass over
15 the public lands.

That the said lands through and over which that portion of said water ditch which is alleged in said complaint to have been injured and destroyed by defendant was located, dug, and constucted and is situate were on the said 25th day of July, 1866, public lands of the United States, over and upon which defendant had the right, by virtue of said grant, to locate its said right of way and build and construct its said railroad and telegraph line, and that in selecting and locating said right of way and in building and constructing said railroad and telegraph line thereon it became and was necessary for defendant, in the proper and convenient selection and location of said right of way, to appropriate to its use and benefit a portion of said public land one hundred feet in width on each side of said railroad, through and over which land the portion of said

water ditch alleged in the complaint to have been injured and destroyed by defendant was located, dug, and constructed, and that defendant did accordingly locate its said right of way for said railroad and telegraph line upon and over said portion of said public land so granted to defendant for said right of way, and being the same ground over and through which that portion of said water ditch alleged in the complaint to have been injured and destroyed by defendant was located and dug, and that defendant did build and construct its said railroad and telegraph on and over said right of way as so located, and that any injury which may have been done to said ditch was done upon that portion thereof which has been so dug and constructed upon and in said right of way land, and was done in the course of the construction and operation of defendant's said railroad and telegraph line thereon and not otherwise.

16 That on the 17th day of May, 1879, long after the date of said grant of said land to defendant for its said right of way, the said Daniel Fisher pretended and attempted to appropriate to his own use, under and by virtue of the provisions of the mining laws of the United States, a portion of said right of way for the purpose of digging and constructing said water ditch thereon and therein, and did thereupon and thereafter proceed to dig and construct said ditch in and upon said right of way land, and that the only claim of right, interest, or property ever made or pretended to be owned by said Daniel Fisher is to said land constituting a part of said right of way and in and through which said ditch was located and dug and constructed, and the only claim of right on his part there to locate and dig that portion of said water ditch was claimed and pretended by him to have been obtained and acquired under and by virtue of his said pretended compliance with certain provisions of said mining laws of the United States, and that said Daniel Fisher never did in fact have any other right, interest, or ownership in said land, nor any right to dig or construct said ditch in or through the same than such right as he attempted to acquire by said pretended compliance with said provisions of said mining laws of the United States, and that plaintiff never has at any time owned or held or claimed to own or hold any right, interest, or property in said land over which the aforesaid portions of said ditch was so located, dug, and constructed except such interest and property therein as he claims and pretends to have acquired under and through said Daniel Fisher, and that all of plaintiff's alleged interest and ownership in said ditch was in like manner claimed and pretended to be acquired by him from, through, and under said Daniel Fisher.

17 And defendant further alleges that defendant took nothing by said deed in the complaint mentioned, for that defendant then owned, by virtue of said grant from the United States, all the rights and property pretended to be conveyed to defendant by said deed, and that defendant never received any consideration whatever for said sum of $250.00 alleged in the complaint to have been paid by defendant for said pretended conveyance therein mentioned.

Wherefore defendant prays judgment against plaintiff for the costs and disbursements of this action.

WHALLEY, BRONAUGH, NORTHUP & DEADY AND P. P. PRIM,
Attorneys for Defendant.

STATE OF OREGON,
County of Multnomah, } *ss:*

I, Walt W. Bretherton, being duly sworn, say on oath that I am the secretary of the above-named defendant, The Oregon and California Railroad Company, and that the foregoing answer is true as I verily believe.

WALT W. BRETHERTON.

Subscribed and sworn to before me, the undersigned, this 17th day of September, A. D. 1885.

F. G. EWARD,
[L. S.] *Notary Public for Oregon.*

Endorsed: Filed Sept. 21st, 1885. W. H. Parker, clerk.

18 In the Circuit Court of the State of Oregon for Jackson County.

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.

Action for Damages.

The plaintiff comes and demurs to the separate defense in the defendant's answer, commencing on line 18, second page, on the following grounds:

1st. Said separate defense does not state facts sufficient to constitute any defense to this action.

2d. The facts stated in the complaint estop the defendant from setting up or claiming the right of way mentioned in said separate defense or any benefit under the grant of the right of way in the act of Congress of July 25th, 1866, mentioned in said separate defense as a defense to this action.

3d. The defendant forfeited and lost all its right under said grant of the right of way over the land where the plaintiff's ditch is situated by its failure to complete its railroad to and over said land on or before the 1st day of July, 1875, and has at no time since had or owned any right or interest in said land or right of way over the same.

H. K. HANNA & E. B. WATSON,
Attorneys for Plaintiff.

Endorsed: Filed October the 5th, 1885. W. H. Parker, clerk.

19 Be it remembered that a regular term of the circuit court of the State of Oregon for the county of Jackson begun and

held at the court-room, in the town of Jacksonville, in said county and State, on Monday, the fifth day of October, A. D. 1885, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court, when were present the Hon. L. R. Webster, judge, presiding; T. B. Kent, dist. attorney; W. H. Parker, clerk; A. S. Jacobs, sheriff; when, on Monday, the fifth day of October, A. D. 1885, or the first judicial day of said term, among other the following proceedings were had, to wit:

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant.
} Action at Law to Recover Damages.

Now, at this time, comes the plaintiff in the above-entitled action, by E. B. Watson and H. K. Hanna, his attorneys, and defendant comes, by P. P. Prim, its attorney; and the defendant, The Oregon and California Railroad Company, having filed its petition and bond for the removal of the above-entitled action into the circuit court of the United States for the district of Oregon, and the court being fully advised in the premises, and it appearing from said petition that in this action there is a controversy between William Bybee, as plaintiff, and The Oregon and California Railroad Company, as defendant, and that said controversy is for a sum greater than five hundred dollars, exclusive of costs, and that the same arises under laws of the United States, and it further appearing that this is the first term of this court at which said action could be tried,
20 it is ordered and adjudged that the prayer of said petition be granted, and that said action be removed into the circuit court of the United States, to be tried in the district of Oregon.

(Record signed) L. R. WEBSTER, *Judge.*

STATE OF OREGON, *County of Jackson,* } *ss:*

I, W. H. Parker, clerk of the county and circuit court of the State of Oregon for the county of Jackson, do hereby certify that the foregoing transcript, the journal entries in the above-entitled action, has been compared by me with the original entries made in the above-entitled action now remaining in custody and in my office; that it is a correct transcript therefrom and of the whole of such original journal entries and of all the pleadings and other papers filed therein.

Seal of County Court for Jackson County, Oregon.

In witness whereof I have hereunto set my hand and the seal of the said court this 10th day of October, A. D. 1885.

W. H. PARKER, *Clerk,*
By E. D. FONTRAY, *Deputy.*

21 STATE OF OREGON, *County of Jackson,* } *ss:*

I, W. H. Parker, county clerk and *ex officio* clerk of the circuit

court of the county and State aforesaid, do hereby certify that I have carefully compared the foregoing transcript with the original papers in the action at law in the circuit court of the State of Oregon for Jackson county, wherein William Bybee is plaintiff and The Oregon and California Railroad Company is defendant, and that the same are true and correct copies therefrom, with endorsements, and of the whole of such originals and now on file in my office and custody; and I further certify I have compared carefully the transcript of journal entry in the foregoing action, and that the same is correct and includes all the journal entries in said action.

In witness whereof I have hereunto set my hand and the seal of the county court for said county this 12th day of Oct., 1885.

W. H. PARKER,
County Clerk,
By E. D. FONDRAY, *Deputy.*

(Transcript endorsed:) Filed Oct. 17, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

22 And afterwards, to wit, on the 31st day of October, 1885, there was duly filed in said court a notice in words and figures as follows, to wit:

23 In the Circuit Court of the United States for the District of Oregon.

WILLIAM BYBEE, Plaintiff,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant.

To the above-named plaintiff, Wm. Bybee, and E. B. Watson and H. K. Hanna, his attorneys:

You are hereby notified that the transcript of the record removing the above-entitled cause from the circuit court of the State of Oregon for Jackson county into the circuit court of the United States for the district of Oregon has been filed in the last-named honorable court, and that on Monday, the 9th day of November, 1885, at the hour of 10 o'clock a. m., the defendant will move the court to set down for argument at that time or at such future time thereafter as the court may direct the demurrer of the plaintiff to the answer of defendant in said cause.

WHALLEY, BRONAUGH, NORTHUP & DEADY,
Attorneys for Defendant.

STATE OF OREGON,
County of Jackson.

I, H. K. Hanna, attorney for plaintiff, hereby acknowledge the service of the within notice, in Jackson county, Oregon, on this 27th day of October, 1885, together with a true copy thereof, duly certified to by J. W. Whalley, one of the attorneys for defendant.

H. K. HANNA,
One of Pl'ff's Att'ys.

Endorsed: Filed Oct. 31, 1885. R. H. Lamson, clerk.

24 And afterwards, to wit, on Monday, the 16th day of November, 1885, the same being the 26th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

25 In the Circuit Court of the United States for the District of Oregon.

WILLIAM BYBEE
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY. } No. 1167.

NOVEMBER 16, 1885.

Now, at this day, on motion of Mr. E. C. Bronaugh, of counsel for defendant, it is ordered that this cause be, and the same is hereby, set for hearing on the demurrer to the answer on Friday, December 4, 1885.

26 And afterwards, to wit, on Friday, the 19th day of February, 1886, the same being the 71st judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

27 In the Circuit Court of the United States for the District of Oregon.

WILLIAM BYBEE
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY. } No. 1167.

FEBRUARY 19, 1886.

This cause was heard upon the demurrer to the answer, and was argued by Mr. James F. Watson, Mr. E. B. Watson, and Mr. H. K. Hanna, of counsel for the plaintiff, and by Mr. Earl C. Bronaugh, of counsel for the defendant; on consideration whereof it is ordered that said demurrer be, and the same is hereby, overruled.

28 And afterwards, to wit, on the 19th day of February, 1886, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

29 U. S. Circuit Court, District of Oregon.

FRIDAY, *February* 19, 1886.

WILLIAM BYBEE
v.
THE OREGON & CALIFORNIA RAILWAY COMPANY. } No. 1167. Action to Recover Damages.

(1.) Grant to the O. & C. R'y Co. by the act of 1866.—The grant of lands and the right of way to the O. & C. R'y Co. by the act

of July 25, 1866 (14 Stat., 239), and the act of June 25, 1868 (15 Stat., 80), construed to be: (1) A grant of the odd sections of land within ten miles on each side of the line of the road, not otherwise appropriated or disposed of under the laws of the United States, prior to the definite location of said line, on condition that the road is completed by July 1, 1880, for a breach of which condition the grantor alone can claim a forfeiture; (2) the grant of the right of way absolute, to take effect on the definite location of the line of the road from the passage of the act of 1866, as against any person claiming under a settlement or appropriation subsequent to the passage thereof, without condition, save that which the law tacitly annexes to the grant of any such franchise, the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the Government for that purpose.

(2.) Idem.—The declaration in section 8 of the act of 1866, that in case the road is not completed by the time prescribed "this act shall be null and void," taken in connection with the context, that the lands not patented to the company at the date of any such failure "shall revert to the United States," and the general purpose of the act and the policy of Congress in passing it, amounts to nothing more than a declaration that the lands are granted on the condition that if the road is not completed in due time the portion then remaining unpatented or unearned may be reclaimed by the United States.

DEADY, *J.:*

This action was brought in the circuit court of the State for Jackson county to recover damages for an alleged injury to a water ditch.

The defendant answered, denying sundry allegations in the complaint, and then set up a title or right of way in itself over the *locus in quo* under an act of Congress, to which defence the plaintiff demurred.

Thereupon the cause was removed by the defendant to this court, as one arising under a law of the United States, where the questions arising on the demurrer were argued by counsel.

It is alleged in the complaint that the defendant is a corporation duly organized under the laws of Oregon; that on September 3, 1883, the plaintiff was the owner in fee of an undivided half interest in a certain water ditch and right, situated on the south side of Rogue river, in said county, and in the possession thereof, as tenant in common with Daniel Fisher, when he and said Fisher, in consideration of $250 paid them by the defendant, conveyed to it the right to enter on said ditch and construct and operate its railway over the same, on condition, however, that it would not impair or obstruct the use or enjoyment of said ditch by said grantors; to which condition the defendant assented and entered into possession of the premises in pursuance of said deed and subject to said condition; that, notwithstanding, the defendant constructed its road across said ditch in such a manner as to permanently obstruct and destroy the

same, and that the defendant has appropriated said ditch to its exclusive use, so as to prevent the flow of water therein where said road crosses the same, to the damage of plaintiff $7,000.

It is stated in the defence in question that the defendant was incorporated to construct and operate a railway and telegraph line from Portland to the southern boundary of the State; that by § 3 of the act of July 25, 1866 (14 Stat., 240), entitled, "An act granting lands to aid in the construction of a railway and telegraph line from the Central Pacific railway in California to Portland, Oregon," there was granted to the defendant the right of way through the public domain to the extent of 200 feet in width wherever its road might be located on said lands; that the ditch at the point alleged to be injured was located and dug and is situated on the public domain, where, on July 25, 1866, the defendant, by virtue of the grant aforesaid, had the right to locate its road, in doing which and in constructing and operating the same it became necessary for the defendant to appropriate 200 feet in width of the land over which said ditch was located, and construct and operate its road thereon, and that any injury which was done to said ditch was the result of such construction and operation and not otherwise; that on May 17, 1879, said Fisher attempted to appropriate the land in question to his use under the mining laws of the United States, and thereafter constructed said ditch over said "right of way land," which is the only claim said Fisher ever had or made thereto, and the plaintiff claims under said Fisher, and never had or made any other claim to the premises than the one so derived, and that the defendant took nothing by said deed from the plaintiff, for that it then owned by virtue of said grant all the right and property pretended to be conveyed thereby.

The causes of demurrer assigned to this defense are: (1) It does not state facts sufficient to constitute a defense; (2) the plaintiff is estopped on the facts stated from claiming the right of way under said act of July 25, 1866; and (3) the defendant forfeited its right of way under said grant by its failure to complete its road over the same on or before July 1, 1875.

By § 2 of the act of 1866 there was granted to the defendant, to aid in the construction of its road, every alternate section of the public lands, designated by odd numbers, to the amount of ten such sections per mile, not otherwise disposed of by the United States, with the right to select from the odd sections within ten miles of each side of said grant lands in lieu of any that may be so disposed of prior to the location of the line of said road.

And by § 3 there was granted to it the right of way over the public lands to the extent of 100 feet on each side of the road where the same may pass over said lands.

By §§ 6 and 8 of said act it is provided that unless "the whole" of the road is completed before July 1, 1875, the "act shall be null and void, and all the lands not conveyed by patent to said company" at the date of said failure "shall revert to the United States;" but by the act of June 25, 1868 (15 Stat., 80), the time for completing the road was extended to July 1, 1880.

It is nowhere directly stated that the road was not completed within the time prescribed by Congress, but it is fairly inferrible that such is the case from the fact, stated in the complaint and not denied in the defense, that on September 3, 1883, the defendant took a deed from the plaintiff giving the former the right to construct and operate its road at a point between the termini thereof across the ditch of the latter; and it is a matter of such common notoriety that the road was not constructed south of Rosenburg until after 1880, and it is not yet quite completed to the southern boundary of the State, that the court may well take judicial notice of the fact, and on the argument it was practically admitted.

This act is a present grant, but the particular sections that pass to the company under it cannot be ascertained until the route is definitely located; but when ascertained the title attaches from the date of the act. It is also a grant made on a condition subsequent—that the road shall be completed by a prescribed time; but no one can take advantage of a breach of this condition but the Government—the grantor—and in the nature of things it can only do so by judicial proceedings authorized by law or a legislative resumption of the grant.

This well-settled rule of law concerning the operation of a condition subsequent annexed to an estate in lands in fee and the effect of a breach thereof has been uniformly applied by the Supreme Court to the grants of the public lands made by Congress in aid of the construction of railways with the condition annexed that they should be completed within a specified time.

Railroad *v.* Smith, 9 Wall., 97.
Schulenberg *v.* Harriman, 21 Wall., 60.
Leavenworth R'y Co. *v.* U. S., 92 U. S., 740.
Mo. R'y Co. *v.* K. P. R'y Co., 97 U. S., 496.

But counsel for the demurrer contend that the language of the act of 1866 is peculiar, and that by operation of § 8 the act becomes "null and void" at once and *in toto* whenever and as soon as there is a breach of the condition concerning the completion of the road.

But the general expression, "this act shall be null and void," is qualified by the words immediately following, "and all the lands not conveyed by patent to said company * * * at the date of any such failure shall revert to the United States." This shows how far and for what purpose the act would, in such contingency, become "null." Certainly it would not become "null" as to the lands already patented under it or earned in pursuance of it. In other words, it is to become "null" only so far as to allow the grantor to resume the grant on a failure to comply with the condition, and then only as to the lands remaining unpatented or unearned; and but for this qualification the grant might have been wholly resumed or forfeited for any failure to comply with the condition, even in the construction of the last mile; and this construction of the section is in harmony with the general purpose of the act and the policy of Congress in making the grant.

In the leading case of Schulenberg *v.* Harriman, *supra*, the act

making the grant did not, it is true, declare that the same should become "null and void" on a failure to comply with the condition and complete the road, but it did provide what, in my judgment, is but the legal equivalent, in this respect, of § 8 of the act of 1866, namely, "If said road is not completed within ten years no further sales shall be made and the lands unsold shall revert to the United States," and so thereafter the act would cease to have any force or effect and practically would be "null."

30 Nor did the failure to complete the road by July 1, 1880, in any view of the matter, cause the act of 1866 to become "null" as to the right of way. The grant of the right of way is a separate and distinct matter from that of the lands to aid in the construction of the road. The reversion or forfeiture provided for in § 8 of the act of 1866 does not include the right of way, but is limited to the "lands" remaining unpatented or unearned at the time of the failure. The grant of the right of way is without condition except that which the law tacitly annexes to all such easements, the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the Government for that purpose; but it is also a present absolute grant, and takes effect when the line of the road is located from the date of the act as against any intervening claim or settlement whatever. Whoever settled on or appropriated for any purpose, under any law of the United States, any portion of the public lands on the possible line of this road after July 25, 1866, did so subject to this grant of the right of way to this defendant.

It appears from the defense that the plaintiff never was the owner of the land in question, but that it has been occupied or appropriated by him and those under whom he claims since May, 1879, under the act of July 26, 1866 (14 Stat., 253), entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes."

But this occupation commenced long after the passage of the act granting the right of way over this land to the defendant and is subordinate thereto, and this is so without reference to the fact that the act under which the ditch was dug is one day later in time than the other; for no one can claim any right under that act to any particular place or piece of ground prior to his occupation or appropriation of the same thereunder.

The conclusion here reached in regard to the nature and effect of the grant of the right of way to the defendant is fully sustained by the Supreme Court in R'y Co. *v.* Alling, 99 U. S., 474, and R'y Co. *v.* Baldwin, 103 U. S., 428. In the latter of these cases Mr. Justice Field suggests the reasons why grants of land in aid of the construction of railways have generally been made subject to the right of appropriation by individuals under the pre-emption and other like laws of the United States, between the date of the act making the grant and the fixing of the limits and operation of the grant by the definite location of the line of the road, while those of the mere right of way have been made absolute and to take effect from the passage of the act as against any location claim or settlement made

after the date of the grant and before the definite location of such right.

He says: "The grant of the right of way * * * contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed; nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route."

In the construction of this ditch on the possible line of the defendant's right of way from Portland to the southern boundary of the State the parties engaged therein took the risk that such line might be located on, along, or across the same; in which case their right under the ditch and canal act of 1886 must so far yield to the prior and better right of the defendant under the railway act of the same year. Doran *v.* Central Pacific R'y Co., 24 Cal., 259.

In this case the court say: "The grant by Congress of the right of way over any portion of the public land to which the United States have title and to which private rights have not been attached under the laws of Congress vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering in pursuance of his grant, or can recover damages that may necessarily be occasioned by sach entry."

But the plaintiff contends that the defendant is estopped by the acceptance of the deed of September 3, 1883, from asserting its prior title to the premises under the act of 1866, granting it the right of way over the same.

It is a well-established rule of law that ordinarily a vendee is under no obligation to support his vendor's title, and therefore he is not estopped to deny the same, except in a few cases where his conduct in so doing would be repugnant to his acceptance of the grantor's deed or a claim made under it. Society, etc., *v.* Pawlet, 4 Pet., 506; Blight *v.* Rochester, 7 Whea., 547; Croxall *v.* Sherred, 5 Wall, 287; Merryman *v.* Bourne, 9 Wall., 600; Sparrow *v.* Kingman, 1 Com., 242; Coakley *v.* Penny, 3 Ohio St., 344; Stark *v.* Starr, 1 Saw., 24; Bigelow on Estoppel, 294.

This is a peculiar case, and my attention has not been called to one that is its exact parallel.

At the date of his deed the plaintiff's ditch was constructed along

and across the premises, but the legal right to the use and possession thereof for the purpose of its incorporation was in the defendant. From the date of the definite location of the line of the defendant's road the plaintiff had no right or easement to or in the land within the defendant's right of way, and was to all intents and purposes a naked trespasser thereon. He therefore had nothing to sell or convey to the defendant. His possession, if any, was merely constructive. Under these circumstances, the parties apparently supposing that the plaintiff had acquired some right to flow the water over the premises, the defendant purchased the privilege of constructing and operating its road across and along the ditch for $250, and on the further condition that it would not thereby obstruct or impair the same.

But this condition or covenant being incident to and dependent on the conveyance of some right in the premises to the defendant, if the latter is at liberty to show that nothing passed by such conveyance, the condition or covenant is left without consideration or support and falls to the ground; but if there is any good reason in law or justice, notwithstanding the want of title in the plaintiff, that the defendant should keep this condition or covenant, it will be estopped to show a want of consideration from the plaintiff.

But the plaintiff has really parted with nothing, nor has the defendant obtained anything from him, although it has paid the plaintiff $250. The ditch was dug on what turned out to be the defendant's right-of-way land, and the plaintiff in consenting to allow it to construct and operate its road thereon surrendered nothing to which it had any legal right. The conveyance was altogether an idle and superfluous act, and whatever misapprehension of the parties as to their rights in the premises may have induced it, in legal effect it is a mere nullity.

The case of Holden *v.* Andrews (38 Cal., 119) is somewhat analogous.

Holden being in possession of a tract of the public land sold or abandoned the same to Andrews for a specified sum, to be paid in the future. Andrews failed to pay and Holden brought an action to recover the possession of the land, in which he had judgment. On the trial the defendant offered to prove that since the sale he had acquired the title from the United States under the homestead law, which was not allowed on the ground that he was estopped from setting up the after-acquired title from the United States without first surrendering the possession obtained by his purchase from the plaintiff. On appeal the judgment was reversed and a new trial ordered. The opinion of the court was delivered by Mr. Justice Sawyer; who said: "We think this is not a case that falls within the rule. The plaintiff did not pretend to have any other title than by naked possession."

In Coakley *v.* Penny, *supra* (347), the court says: "The decisions in this country in which the grantee and those claiming under him were held to be estopped to deny the title of the grantor were cases in which the grantee received and held possession under the con-

veyance and relied upon it as his source of title and not where the grantee held the title under a prior and independent conveyance."

Here the defendant derived nothing from the plaintiff and does not rely on his conveyance as a source of title, but does rely on a title derived from the United States prior to such conveyance.

On the whole, my judgment is that this case is not an exception to the rule, which allows a vendee to deny his grantor's title, and from the facts stated in this defence it clearly appears that the defendant took nothing by the conveyance from the plaintiff and is therefore not bound to keep the condition or covenant therein concerning the plaintiff's ditch.

The demurrer must be overruled, and it is so ordered.

Mr. Edward B. Watson and Mr. James F. Watson for the plaintiff.
Mr. E. C. Bronaugh for the defendant.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed Feb. 19, 1886. R. H. Lamson, clerk.

31 And afterwards, to wit, on Wednesday, the 10th day of March, 1886, the same day being the 79th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

32 In the Circuit Court of the United States for the District of Oregon.

WILLIAM BYBEE
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY. } No. 1167.

MARCH 10, 1886.

Now, at this day, comes the defendant, by Mr. John W. Whalley, of counsel, and moves the court for final judgment in its behalf against the plaintiff herein for want of reply to defendant's answer; and thereupon, said plaintiff electing to stand upon his demurrer to said answer and not desiring to plead further thereto, said motion of defendant is allowed. It is therefore considered that said plaintiff take nothing by his said action; that defendant go hence without day, and that it have and recover of and from the plaintiff its costs and disbursements herein, taxed at — dollars.

33 And afterwards, to wit, on the 28th day of September, 1887, there was duly filed in said court a bond on appeal in words and figures following, to wit:

34 In the Circuit Court of the United States for the District of Oregon.

WILLIAM BYBEE
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY.

Know all men by these presents that we, William Bybee and Alexander Hamilton, are held and firmly bound unto the Oregon and California Railroad Company in the sum of five hundred dollars, to be paid to the said Oregon and California Railroad Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated September 28, 1887.

Whereas the above-named William Bybee has sued a writ of error — the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named William Bybee shall prosecute said writ to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. BYBEE. [L. S.]
A. HAMILTON. [L. S.]

Signed, sealed, and delivered in presence of—
H. K. HANNA,
A witness to signature of Wm. Bybee.
R. B. LAMSON,
As to A. Hamilton.

UNITED STATES OF AMERICA,
District of Oregon, } *ss:*

I, Alexander Hamilton, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of ten hundred dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. HAMILTON.

Subscribed and sworn to before me this September 28, 1887.

R. H. LAMSON, *Clerk*,
By R. B. LAMSON, *Deputy*.

Approved September 28, 1887.

MATTHEW P. DEADY,
U. S. District Judge.

35 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, —— ——, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and — holder within said district, and that I am worth in property situated therein the sum of — dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

—— ——.

Subscribed and sworn to before me this ——, 188—.

—— ——.

Approved ——, 188—.

—— ——.

(Endorsed:) No. 1167. U. S. circuit court, district of Oregon. William Bybee *vs.* The Oregon and California R. R. Co. Bond. Filed Sept. 28, 1887. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

35½ And afterwards, to wit, on the 29th day of September, 1887, there was duly filed in said court an assignment of errors in words and figures as follows, to wit:

36 In the Supreme Court of the United States.

WILLIAM BYBEE, Plaintiff in Error,
vs.
THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant in Error.

Writ of Error to the Circuit Court of the United States for the District of Oregon.

Plaintiff in error comes, by his attorneys, Watson, Hume & Watson and J. H. Mitchell, and assigns the following errors in the judgment and record of the circuit court of the United States for the district of Oregon, described in the writ of error to which this assignment of errors is attached, upon which he relies to reverse said judgment:

First. Said court erred in that it overruled the demurrer of plaintiff in error to the defense of new matter set up in the answer of defendant in error.

Second. Said court erred in that it did not sustain said demurrer.

Third. Said court erred in that it decided and adjudged that the new matter set up in the answer did state facts sufficient to constitute a defense to the complaint.

Fourth. Said court erred in that it decided and adjudged that defendant was not estopped by the facts stated in the complaint and admitted by the answer from claiming the right of way set up in the answer.

Fifth. Said court erred in that it decided and adjudged that defendant did not forfeit its right of way at the point where it intersected plaintiff's ditch under the act of Congress set up in
37 the answer by its failure to either locate the line of its road or to complete its road over the same at said point on or before July 1, 1890.

Sixth. Said court erred in that it rendered judgment against this plaintiff for costs and disbursements.

WATSON, HUME & WATSON &
JOHN H. MITCHELL,
Att'ys for Plaintiff in Error.
JOHN H. MITCHELL,
Counsel for Pl'ff in Error.

STATE OF OREGON, *County of Multnomah,* } ss:

Due service of the within assignment of errors is hereby accepted, at Portland, Oregon, this 29 day of Sept., 1887, by receiving a copy thereof, duly certified to as such by James F. Watson, counsel for plaintiff in error.

WHALLEY, BRONAUGH & NORTHUP,
Attorneys for Def't in Error.

Endorsed: Filed Sept. 29, 1887. R. H. Lamson, clerk.

38 UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a true copy of the record and of all the proceedings, including the opinions of the court, in the cause entitled William Bybee *vs.* The Oregon and California Railroad Company, in said court determined.

Seal United States Circuit Court, Oregon.

Witness my hand and the seal of said court, at Portland, this September 29, 1887.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

Endorsed on cover: Oregon C. C. U. S. No. 276. William Bybee, plaintiff in error, *vs.* The Oregon and California Railroad Company. Filed October 22, 1887.

Office Supreme Court U. S.
FILED.
MAR 28 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 276.

WILLIAM BYBEE, Plaintiff in Error,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the District of Oregon.

BRIEF ON PART OF PLAINTIFF IN ERROR.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

Press of McGill & Wallace, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1890. No. 276.

WILLIAM BYBEE, PLAINTIFF IN ERROR,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the District of Oregon.

Brief on Part of Plaintiff in Error.

Statement of Case.

This case is here on a writ of error from the Circuit Court of the United States for the District of Oregon—the plaintiff in error being the plaintiff in the case in the Court below. It comes on demurrer to the answer of the defendant below—the Oregon and California Railroad Company—the Court below overruling the demurrer and giving judgment against the plaintiff for costs. The action was originally commenced in the Circuit Court of the State of Oregon for Jackson County, and subsequently—at the instance of the defendant—removed to the Circuit Court of the United States for

the District of Oregon on the ground that the construction of an act of Congress was involved in the case. The material averments in the complaint are as follows:

The Complaint.

That the defendant, the Oregon and California Railroad Company, is a corporation, duly incorporated and organized under the laws of the State of Oregon.

That on the thirty-first day of September, 1883, the plaintiff was the owner in fee of an undivided one-half interest in a certain water-ditch and water-right connected thereto and used therewith, located on the south side of Rogue River, in Jackson County, Oregon, and was at that date in the lawful and peaceful possession of said ditch and water-right as tenant in common therein with one Daniel Fisher.

That on said date the plaintiff and said Daniel Fisher, for the consideration of $250 to them paid, duly executed a deed to defendant, the Railroad Company, conveying to it the right to enter upon said water-ditch and construct, maintain, and operate its railroad and telegraph line over and across the same, but upon the condition that it should not in any way injure or destroy said water-ditch, or impair or obstruct the use or enjoyment of said water-ditch by the plaintiff or said Daniel Fisher as a means of conveying water through or along the same by any act or acts on its part in constructing, maintaining, or operating its railroad or telegraph line over or across the said water-ditch. The complaint further avers that the defendant, the Railroad Company, then and there assented to said condition, and thereupon accepted said deed, and received possession of said water-ditch from the plaintiff and said Daniel Fisher under said deed and upon said condition, and entered upon and constructed its said railroad and telegraph line across said water-ditch, but in such a manner as to

permanently obstruct and destroy the same and render it impossible to convey water through or along the same at the point where the defendant's said railroad crosses the same constructed as aforesaid.

The complaint further avers that the defendant, the Railroad Company, has ever since the construction of said railroad and telegraph line across said water-ditch retained and still does retain possession of said water-ditch so obtained under said deed, and ever since has and still does maintain and operate its said railroad and telegraph line so constructed across the same as to prevent any use of said water-ditch for the conveyance of water through or along the same, and has wrongfully and unlawfully appropriated a portion of said water-ditch where its railroad and telegraph crosses the same to its own exclusive use and benefit, and has refused and still does refuse to pay or make the plaintiff any compensation for his interest therein.

The complaint concludes as follows:

"That by reason of said wrongful acts of the defendant the plaintiff's said interest in the said water-ditch and water-right has been destroyed and rendered entirely valueless, and he has been damaged thereby in the sum of $7,000, for which sum he asks judgment against the defendant, together with his costs and disbursements in this action."

Record, p. 5.

To this complaint the defendant in the Court below, the Oregon and California Railroad Company, filed the following answer:

Answer.

"The defendant, for answer to the complaint of the plaintiff in the above-mentioned action, denies that on the third day of September, 1883, or at any other time whatever, either the said plaintiff or the said Daniel Fisher was the owner in fee simple or otherwise of any

undivided one-half interest or any interest whatever in any part of that portion of said alleged water-ditch or water-right mentioned in the complaint and therein alleged to have been injured and destroyed by this defendant, and denies that either plaintiff or said Fisher was in the lawful possession thereof at any time.

"Defendant denies that said deed, mentioned in said complaint as having been executed by said plaintiff and said Daniel Fisher to defendant, was executed upon or contained any condition whatever, and denies that defendant ever assented to said alleged or any condition in connection with the execution or delivery of said deed or otherwise with relation thereto or in connection therewith, or thereupon or otherwise received possession of said water-ditch or any part thereof from the plaintiff and said Daniel Fisher, or from either of them under said deed or otherwise.

"Defendant alleges that it has no knowledge or any information sufficient to form a belief as to whether its said railroad and telegraph was or was not constructed in such a manner as to permanently obstruct or so as to destroy any part of said water-ditch or so as to render it impossible to convey water through or along the same or any part thereof.

"Denies that defendant ever obtained or held or retained possession of any portion of said water-ditch under said or any deed, and denies that the maintaining or operating said railroad or telegraph line prevents the use of said water-ditch for the conveyance of water through or along the same, and denies that defendant has wrongfully or unlawfully or otherwise appropriated any portion of said water-ditch to its own use, and denies that by any wrongful or other act of defendant any interest of plaintiff in said water-ditch or water-right or in any portion thereof has been destroyed or rendered valueless, or that the plaintiff has been thereby or otherwise damaged in any sum of money whatever or otherwise.

"And for further and separate answer and defense to said complaint defendant alleges that the enterprise, business, pursuit, and occupation for which defendant was incorporated was and is, among other things, to construct, equip, maintain, and operate a railroad and tele-

graph line, with all the necessary branches, side-tracks, fixtures, buildings, depots, stations, and appurtenances, from Portland, in the State of Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue river valleys to the California line on the southern boundary of Oregon.

"That by section three of an act of Congress entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July 25, 1866, there was granted to this defendant, among other things, the right of way through the public lands of the United States to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands.

"That the said lands through and over which that portion of said water-ditch which is alleged in said complaint to have been injured and destroyed by defendant was located, dug, and constructed and is situate, were on the said 25th day of July, 1866, public lands of the United States, over and upon which defendant had the right by virtue of said grant to locate its said right of way and build and construct its said railroad and telegraph line, and that in selecting and locating said right of way and in building and constructing said railroad and telegraph line thereon it became and was necessary for defendant, in the proper and convenient selection and location of said right of way, to appropriate to its use and benefit a portion of said public land one hundred feet in width on each side of said railroad through and over which land the portion of said water-ditch alleged in the complaint to have been injured and destroyed by defendant was located, dug, and constructed, and that defendant did accordingly locate its said right of way for said railroad and telegraph line upon and over said portion of said public land so granted to defendant for said right of way, and being the same ground over and through which that portion of said water-ditch alleged in the complaint to have been injured and destroyed by defendant was located and dug, and that defendant did build and construct its said railroad and telegraph on and over said right of way as so located, and that any injury which may have been done to said ditch was done upon

that portion thereof which has been so dug and constructed upon and in said right of way land, and was done in the course of the construction and operation of defendant's said railroad and telegraph line thereon and not otherwise.

"That on the 17th day of May, 1879, long after the date of said grant of said land to defendant for its said right of way, the said Daniel Fisher pretended and attempted to appropriate to his own use, under and by virtue of the provisions of the mining laws of the United States, a portion of said right of way for the purpose of digging and constructing said water ditch thereon and therein, and did thereupon and thereafter proceed to dig and construct said ditch in and upon said right of way land, and that the only claim of right, interest, or property ever made or pretended to be owned by said Daniel Fisher is to said land constituting a part of said right of way and in and through which said ditch was located and dug and constructed, and the only claim of right on his part there to locate and dig that portion of said water-ditch was claimed and pretended by him to have been obtained and acquired under and by virtue of his said pretended compliance with certain provisions of said mining laws of the United States, and that said Daniel Fisher never did in fact have any other right, interest, or ownership in said land, nor any right to dig or construct said ditch in or through the same than such right as he attempted to acquire by said pretended compliance with said provisions of said mining laws of the United States, and that plaintiff never has at any time owned or held, or claimed to own or hold, any right, interest, or property in said land over which the aforesaid portions of said ditch were so located, dug, and constructed, except such interest and property therein as he claims and pretends to have acquired under and through said Daniel Fisher, and that all of plaintiff's alleged interest and ownership in said ditch was in like manner claimed and pretended to be acquired by him from, through, and under said Daniel Fisher.

"And defendant further alleges that defendant took nothing by said deed in the complaint mentioned, for that defendant then owned, by virtue of said grant from the United States, all the rights and property pretended

to be conveyed to defendant by said deed, and that defendant never received any consideration whatever for said sum of $250 alleged in the complaint to have been paid by defendant for said pretended conveyance therein mentioned.

"Wherefore defendant prays judgment against plaintiff for the costs and disbursements of this action."

Record, pp. 7–10.

To this answer the plaintiff interposed the following demurrer:

Demurrer to Separate Defense.

"The plaintiff comes and demurs to the separate defense in the defendant's answer, commencing on line 18, second page, on the following grounds:

"1st. Said separate defense does not state facts sufficient to constitute any defense to this action.

"2d. The facts stated in the complaint estop the defendant from setting up or claiming the right of way mentioned in said separate defense or any benefit under the grant of the right of way in the act of Congress of July 25, 1866, mentioned in said separate defense as a defense to this action.

"3d. The defendant forfeited and lost all its right under said grant of the right of way over the land where the plaintiff's ditch is situated by its failure to complete its railroad to and over said land on or before the 1st day of July, 1875, and has at no time since had or owned any right or interest in said land or right of way over the same."

Record, p. 10.

This demurrer was overruled by the Court below, and the plaintiff standing by his demurrer, judgment was rendered against him for costs. From this judgment of the Court the case is here on writ of error.

Assignment of Errors.

1st. The Court erred in overruling the demurrer of the plaintiff in the Court below to the defendant's separate answer.

2d. The Court erred in not sustaining the demurrer of plaintiff in the Court below to the defendant's separate answer.

3d. The Court erred in rendering judgment against the plaintiff for costs and disbursements.

4th. The Court erred in holding that the grant of Congress of date July 25, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph from the Central Pacific Railway in California to Portland, Oregon," was a *present grant* with conditions subsequent liable to be defeated only by the failure to comply with such condition, and that a re-entry by the Government or its equivalent was necessary to work a forfeiture.

5th. The Court erred in failing to hold that the act of Congress referred to became by operation of its eighth section null and void immediately and *in toto* whenever and as soon as there was a breach of the condition concerning the completion of the road.

6th. The Court erred in failing to hold that the defendant forfeited and lost all its right under said grant of July 25, 1866, of the right of way over the land where plaintiff's ditch is located, by its failure to complete its railroad to and over said lands on or before the first day of July, 1880, and in failing to hold that such company had at no time since had or owned any right or interest in said land or right of way over the same, save that derived by virtue of the deed from plaintiff in error and said Daniel Fisher.

7th. The Court erred in holding that the rights of the defendant in error, the Railroad Company, were superior under its grant of July 25, 1866, to the rights of the plaintiff in error under the act of Congress passed one day later, July 26, 1866 (14 Stats., 253), entitled "An Act granting the right of way to ditch and canal owners over the public lands and for other purposes."

8th. The Court erred in failing to hold that the facts stated in the complaint and admitted in the answer estopped the defendant from setting up or claiming the right of way mentioned in said separate defense, or any benefit under the grant of the right of way in the act of Congress of July 25, 1866, mentioned in such separate defense.

Argument.

Two principal questions arise in the consideration of this case. The first is as to the proper construction of the act of Congress of July 25, 1866, granting lands to aid in the construction of a railway and telegraph line from the Central Pacific Railway in California to Portland, Oregon; and *secondly*, a question of estoppel in the event the Court should hold to the construction of the land-grant act claimed for it by the defendant in error. In other words, conceding for the argument all the rights claimed for the Railroad Company by virtue of the granting act, is not that company estopped by reason of its acceptance of the deed described in the complaint and the payment to plaintiffs of the $250—the plaintiff and his co-tenant Fisher not being in possession of the ditch as trespassers, but to say the least, there under color of right—from insisting that it is there rightfully under the act of Congress of July 25, 1866, and is therefore justified in destroying or using in any manner it sees proper the ditch of plaintiff as its own individual property?

The Separate Defense Demurred to.

The defense in this case is based on alleged rights under the act of Congress of July 26, 1866, entitled: An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon. (U. S. Statutes, vol. 14, p. 239.)

The grant was to two corporations—one in California

and the other such corporation as might be designated by the Legislature of the State of Oregon, and said Legislature subsequently designated the defendant herein—each of which was to construct the portion of the road lying in its own State, and connection to be made at or near the State line.

By the first section defendant is "Authorized and empowered to lay out, locate, construct, finish, and maintain a railroad and telegraph line * * * beginning at the City of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid, to be made by the first-named company."

By subsequent sections lands are granted to aid the construction of the road, also a right of way over the public lands.

Section six provides that "said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said road and telegraph line within two years, and the whole on or before the first day of July, one thousand eight hundred and seventy-five."

Section eight enacts: "That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, *this act shall be null and void*, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure *shall revert to the United States.*"

An amendment on June 25, 1868, extended the time for completing the first twenty miles of road for the period of eighteen months from its passage, and of the

whole road until July 1, 1880. (U. S. Statutes, vol. 15, p. 80.)

Another amendment on April 10, 1869, extends the time for filing assent for one year from its passage, and provides that all lands granted by the original act "shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." (U. S. Statutes, vol. 16, p. 47.)

These acts comprise all legislation on the subject.

The road was not completed by July 1, 1880. At that date it had not been constructed south of Roseburg, nor laid out or located more than twenty miles beyond. (See opinion of Court.) And it was not laid out or located over the lands crossed by plaintiff's ditch situated in Rogue River valley until the year 1883. (*Id.*)

The plaintiff's ditch was laid out and constructed under authority of the act of Congress of July 26, 1866, and was completed some time in the year 1879. (*Id.*)

The original act of Congress of July 25, 1866, gave the defendant authority to "lay out, locate, and construct" a railroad over the premises in controversy on or before July 1, 1876, which, by the amendment of June 25, 1868, was extended to July 1, 1880.

But the latest date had long passed before it attempted to do any of these things, and when it did make the attempt in 1883 its authority was gone—the act conferring authority having become "*null and void*" in virtue of its own terms.

The granting part of section 2 of the Railroad Act is as follows:

"That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores,

over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad line;"

While section 8 of the act provides as quoted, *supra.*

It is conceded that but for the qualifying provisions of section 8 just quoted this grant must be held to be a grant *in præsenti*, under and by virtue of which the lands granted passed directly as of the date of the grant to the company, and that the conditions of the grant in such event are conditions *subsequent*, and in such case the grant can only be defeated by a failure to comply with the conditions subsequent, and in which case there must be a re-entry upon the part of the Government. But it is respectfully insisted that the words of *present grant* in the second section of the act are so qualified by the provisions of section 8, *supra*, that upon a proper and fair construction of the act *as a whole*, the conditions, and all the conditions, so far as they relate to the right of way and the completion of the road within a certain time, must be held to be conditions *precedent*, and not conditions *subsequent.*

And not only so, but being conditions *precedent*, such failure to comply with them within the time required by the act, especially in view of the provision that in such event the act should be *null and void*, operated *ipso facto* a termination of all right to acquire any further interest in any lands not then patented. It destroyed *eo instanti* the possibility on the part of the company of ever acquiring title to any unpatented lands, which possibility existed so long as the time within which the conditions were to be performed had not elapsed. And by such failure, moreover, the right on the part of the company to secure a perfect title to the lands included in the grant was instantly *severed*, and immediately all such lands not patented, being freed from the conditional claim, the inchoate title of the corporation, *reverted* to the United

States; that is, they were at once by such failure restored to the United States, wholly released and freed, not from any *legal estate* or *title* on the part of the United States, because no such title, it is insisted, had ever passed, but from the claim and right on the part of the company to obtain such title by which they were incumbered prior to such failure.

Stating the contention in another form, the *act itself* becomes, *eo instanti* on such failure—by virtue of its own explicit and emphatic terms, which execute themselves—*null and void*. And, as a necessary sequence, all right and power on the part of the corporation thus in default to proceed further—either to locate its line of road over the public domain or condemn private property to its use for such purpose, or exercise any other corporate function in so far as relates to further location or construction of its road—are terminated.

In other words, the phrase "*this act shall be null and void*" constitutes a *limitation*, and not either a *condition* or *any part* of a condition. All will agree the *conditions* would have been fully and completely stated, and would have been in all respects effectual for the purpose, had it been the intention of Congress to make the grant on conditions *subsequent* rather than on conditions *precedent*, or subject simply to certain drastic *limitations as to power*, if it had simply read "this grant is upon condition * * * and in case of failure the lands shall revert;" or even a milder form of phraseology would have met the purpose just as effectually, as, for instance, "this grant is upon condition that such corporation shall construct twenty miles of its road in one year and the whole road in ten years." The further provision, therefore, so absolutely unnecessary, so entirely superfluous, in stating a condition subsequent merely, that "*this act shall be null and void*"—a provision not to be found in any other public grant save and except in the solitary instance of

the act of March 3, 1877, amending the act of June 8, 1872, granting a right of way to the Denver and Rio Grande Railway Company—evinces clearly, viewed by any and every proper rule of statutory construction, a determination on the part of Congress to take the case out of the usual line of grants on condition subsequent and, instead, make it subject to a clearly and well defined *limitation*, both as to odd sections granted and right of way over the public domain.

It will be observed by the Court that the provisions of this act as to the effect of a failure to comply with the conditions, whether they be regarded as conditions subsequent or conditions precedent, are essentially different in phraseology and in legal effect from the great body of Congressional grants to railroad companies.

A striking similarity, however, will be found between the act under consideration in this respect and the act granting lands to aid in the construction of railroads in the Territory of Minnesota, and which came under consideration in this Court in the case of *Rice* v. *Railroad*, *1 Black*, and in which case this Court held that although words of present grant were used in the granting section which, had they stood alone, would have passed the title as of the date of the grant, they were so qualified by subsequent provisions of the act as to prevent the same from being a present grant.

The granting words in the Minnesota act and those in the grant under consideration are exactly alike, but as in that case the Court found in the subsequent language an intent on the part of Congress to limit and modify the meaning of the words "that there shall be and is hereby granted," so in this case we have the same intent expressed in somewhat similar but much more emphatic language, which makes the conclusion irresistible that no *present estate* was granted or intended to be granted by Congress to these railroad companies.

Mr. Justice Field, in The St. Paul and Pacific R. R. Co. *et al. v.* The Northern Pacific R. R. Co., No. 54, present term, recognized this distinction, and approved the doctrine announced in Rice *v.* Railroad Co., in these words:

"The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of Rice *v.* Railroad Co., 1 Black, 358; but unless qualified, they are to receive the interpretation mentioned."

Legislative grants must be interpreted, if practicable, so as to effect the intention of the grantor, but if the words are ambiguous the construction should be in favor of the Government and against the grantee. (Charles River Bridge *v.* Warren Bridge, 11 Pet., 544.)

The rule is well settled that public grants are to be construed strictly and that nothing passes by implication. Whenever privileges are granted to a corporation and the grant comes under revision in the courts such privileges are to be strictly construed against the corporation and in favor of the public, and nothing passes but what is granted in clear and explicit terms. (Charles River Bridge *v.* Warren Bridge, *supra.*)

In the case of Slidell *v.* Grandjean (*11 U. S., 437, 438*), this Court, in discussing the general subject of grants, said:

"It is also a familiar rule of construction that when a statute operates as a grant of public property to an individual or the relinquishment of a public interest, and there is doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. This rule has been adopted and followed by this Court in many instances in the construction of statutes of this description."

In presenting this case counsel are not unmindful of the rulings of this Court—notably in the case of Baldwin *v.* Railroad Co., 103 U. S., 426—giving construction to an act of Congress, then under review, granting right of way to a railroad company somewhat similar to the act making grant to the defendant in so far as it relates to the nature and effect of the grant of right of way over the public domain; and in discussing this case there is no disposition to contest the correctness of the rule laid down in the case referred to, and perhaps in some other cases since that time, as applicable to the particular grants referred to, and as applicable to the facts presented in connection therewith, as to progress made by the companies respectively under those grants where rights of settlers were supposed to have attached.

Our contention is that the act of July 25, 1866, under which the defendant claims, is radically different from the act discussed in 103 U. S., *supra*, and also that the route or line of road under the former had not, as in the adjudicated cases, been established. The act is different in this, as we have seen, that the act provides *in terms*, not merely that on a failure to build the whole of the road by July 1, 1880, all lands not conveyed by patent to said company at the date of any such failure shall revert to the United States, but *also* that the *act* itself shall be "*null and void.*" No such clause as this appears, so far as I have been able to examine, in any of the other acts of Congress making grants of public lands or right of way over the public lands to any railroad company save in the one amendment, *supra*. It was clearly the opinion of Congress, it would seem, that in the event of a failure upon the part of the company to build the whole road within the time specified, viz., July 1, 1880, to take it out of the power of the company to do a further solitary act under or in pursuance of the act of Congress. It was clearly the intention of Congress

that the company in such a case should be entitled to the lands patented to it, but in so far as any right upon the part of the company was concerned to enter upon the public domain, or any part of it, for the purpose of locating or constructing its road *after* such failure to complete the road within the time specified, it was the intention of Congress to destroy it by declaring, as it did, that the *act itself* should be *null and void.* In other words, the act, taken as a whole, simply conferred a *power* upon the company to be exercised within a certain time and upon certain conditions. A failure to exercise the power within the time was an end of the whole business, and then the act itself under which the company could act ceased to exist, because the power that created it declared that it should then be *dead*—null and void.

This is not the case, therefore, it is respectfully insisted, of an *estate vested* under a *present grant*, and subject to forfeiture for breach of a condition subsequent, but requiring further proceedings to enforce the penalty.

But it is the case of a legislative power not attempted to be exercised until, by the very terms of the instrument creating it, the time within which it could be exercised had expired.

If this power to "lay out, locate, and construct" had been exercised during the prescribed term of its existence, it would have given effect to the granting words in the original act and vested the legal title to the two-hundred-foot right-of-way strip in the defendant.

But as none of these steps was taken during the continuance of the power, no estate ever vested in defendant, and there is no ground for the application of this doctrine.

That the authority to act terminated with the expiration of the time fixed by the amendment of June 25, 1868, is clear from the language used, and well settled by judicial decisions.

Authorities.

A general law of New York required any railroad company organizing under it to begin the construction of its road and expend ten per cent. of its capital thereon within five years after the filing and recording of its articles and declaring that in case of non-performance "*its corporate existence and powers shall cease.*" A subsequent act extended the time.

The construction of the road was not begun within the time as extended. The company afterward attempted to condemn lands for its right of way.

The Court of Appeals held that the proceeding could not be maintained, as the company's authority had ceased *by force of the terms of the act themselves*, without any judicial procedure for the purpose. The Court further said: "*The statute executed itself.* * * * It needed no action or judicial procedure to declare or complete a forfeiture of the charter and loss of corporate powers." (Matter of B., W. & N. Ry. Co., 72 N. Y., 245.)

A special act declaring that upon like default "this act and all the powers, rights, and franchises herein and hereby granted shall be deemed forfeited and terminated," received a like construction by the same Court. (Brooklyn Steam Transit Co. *v.* City of Brooklyn, 78 N. Y., 524.)

The case of the Brooklyn Steam Transit Company *v.* City of Brooklyn, 78 N. Y., 528, *supra*, was an action to restrain the defendant from interfering with the plaintiff in the construction of its road. The plaintiff was incorporated by an act of the legislature of the State of New York, entitled "An act to incorporate the Brooklyn Steam Transit Company, with authority to construct an underground and elevated railroad under or over the streets of the city of Brooklyn."

Section 17 of the act provided as follows:

"This act shall take effect sixty days after the passage

thereof; but unless said Brooklyn Steam Transit Company be organized, and at least one mile of said railroad as it is authorized and empowered to construct under this act be laid within three years thereafter, then and in that case this act and all the powers, rights, and franchises herein and hereby granted shall be deemed forfeited and terminated."

The company failed to construct the mile of road within the time required by the act, and the claim of the defendant was that the plaintiff lost its corporate existence by not building one mile of its road before the expiration of the time limited in the act; and the Court held, that by reason of its failure the rights and powers of the company were so far forfeited and terminated that it could not subsequently proceed to take private property or a public street for the construction of its road; that its corporate right for that purpose was *absolutely gone.* And the Court, in discussing the case, Earle, Justice, said:

"The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not, *ipso facto,* lose its corporate power, or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the Court in an action instituted for that purpose by the Attorney-General in behalf of the people; but it can not be denied that the legislature has the power to provide that the corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used. Here the language used shows that the legislature intended to make the continued existence of the plaintiff as a corporation depend upon its compliance with the requirements of section 17 of the act. In case of non-compliance, *the act itself ceases to have any operation,* and all the *powers, rights, and franchises* thereby granted were '*deemed forfeited and terminated.*' There was

to be not merely a case of forfeiture which could be enforced by an action instituted by the Attorney-General, but the powers, rights, and franchises were to be taken and treated *as forfeited and terminated.* At the end of the time limited the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence."

The Court, in further discussing the case, cited the case of Brooklyn, Winfield and Newton R. R. Co., 72 N. Y., 245, in which the same doctrine was held, and the Court, in commenting upon that case, said:

"That company had not begun the construction of its road within the time limited, and it was held that it had lost its corporate existence, and the same view was emphatically reiterated when a similar case of the same company was again before this Court. (75 N. Y., 335.) It was held that the statute *executed itself,* and that the intervention of the courts in an action instituted by the Attorney-General was not necessary. The language of limitation used in section 17 in the act of 1871 more plainly, if possible, indicates the legislative intention—that a failure to comply with the limitation should put an absolute end to the corporation—than the language used in the act of 1867."

The principle recognized in these cases, it is respectfully submitted, is precisely similar to the one for which we contend, namely, that the legislature of a State or the Congress of the United States has the power to provide, either in incorporating a company or making a grant to a company with conditions in the one case, that by the failure upon the part of the corporation to do a certain thing required of it to be done by the act within the time required that its corporate existence shall cease and all its rights and powers be terminated; and that in the other case—on the failure to comply with the conditions specified in the act within the time specified—the grant shall not only revert, but also that the act itself making

the grant shall become *absolutely null and void*, thus making it absolutely impossible for the corporation to proceed in further execution of the terms of the grant after such failure. In other words, that Congress has the power, *by using terms to that end*, to provide in an act making a grant to a railroad company, not only for the *termination of all the powers of the corporation*, but for the forfeiture of all its rights, grants, and privileges, *ipso facto*, on failure to comply with the conditions imposed, and that such an act of the Congress of the United States *executes itself*, and that a *quo warranto* for the purpose of determining the existence of the corporation and its power to act is not necessary in the one case, nor is a re-entry upon the part of the Government by act of Congress or judicial proceeding necessary in the other case, to produce a forfeiture.

It is conceded in the pleadings and also by the Court below in the opinion (Record, 16) that the Oregon and California Railroad Company, defendant, had not completed its road, even so far as the location of the premises in question within the time prescribed by Congress for its completion; nor was it completed to that point, as clearly appears, on September 3, 1883, as it was on that date the defendant purchased from plaintiff and his tenant in common the right to construct and operate its road at a point between the termini thereof across the ditch of the plaintiff.

The Court below, Judge Deady, further remarking on this point, said in his opinion:

"And it is a matter of such common notoriety that the road was not constructed south to Roseburg until after 1880, and it is not yet quite completed to the southern boundary of the State, that the Court may well take judicial notice of the fact, and on the argument it was practically admitted."

Record, 16.

This opinion was delivered February 19, 1886.

The same rule was recognized as correct with reference to the provision in a special act, "the franchises thereby granted shall be *null and void*, unless the corporation shall commence the work of constructing the hotel within two years from the passage of this act, and complete the same within four years from the time of commencing the construction thereof;" but held inapplicable in view of an amendment extending time for the performance of these acts.

Union Hotel Company *v.* Hersee, 79 N. Y., 454, 457, 459.

And to the same effect is the case of Brooklyn, Winfield and Newton R. Co., 81 N. Y., 69. Also the cases of—

Farnham *v.* Benedict (N. Y.), 13 N. E., 784.

South and North Ala. R. Co. *v.* Gilliam (Ala.), 4 So., 694.

And, finally, the opinion of this Court in Railroad Co. *v.* Alling, 99 U. S., 463, cited in the opinion below, explicitly recognizes the correctness of this rule of construction.

An act of Congress of June 8, 1872, granted a right of way over the public lands to the Denver and Rio Grande Railroad Company in the same terms as the grant to the defendant here. But it was accompanied with a proviso for the completion of the road within five years after the passage of the act. (*Id.*, 465.)

By an amendatory act on March 3, 1877, the time for the completion was extended for the period of ten years from the passage of the original act.

And in default thereof it was declared that as to the unfinished part of the road the rights and privileges granted should be "*null and void.*" (*Id.*, 467.) The question before the Court was as to the right of this company to locate its road and appropriate this right of way

through the Grand Cañon of the Arkansas River, as against another railway company claiming under the subsequent general act of Congress of March 3, 1875. It did not locate its line through this cañon until the year 1878.

It was claimed by the other side that it had lost its right to do so at that time by reason of the delay. But upon this point the Court, Mr. Justice Harlan delivering the opinion, says:

"The five years originally given to that company within which to complete its railroad to a point on the Rio Grande as far south as Santa Fé expired on the 8th of June, 1877. Before, however, the expiration of that period the time was extended to ten years from the passage of the original act. Now, it is *solely by reason of such extension* that the Denver Company had the right on the 19th of April, 1878, to take possession of the Grand Cañon and prepare for the final location and construction of its road through that pass." (*Id.*, 479, 480.)

The late Chief Justice Waite, dissenting, declined to go even to this extent, it being his opinion that the grant of the right of way to the Denver and Rio Grande Company contained in the act of June 8, 1872, was no more than a license to enter upon and use such of the public lands of the United States as should be unoccupied and not appropriated to other purposes when the permanent location of its road, with a view to actual construction, should be made.

Now, it is plain that the Court was here considering a *power unexecuted* within the time limited, and not an *interest vested*, requiring further proceedings to restore it to the grantor. And the principle announced exactly covers the present case. Here there was no survey, no location, until *after* the power to locate had expired by its own limitation, and until after plaintiff had constructed his ditch under another act of Congress.

The other decision (Railroad Co. *v.* Baldwin, 103 U. S., 426), cited and relied upon below, involves no such issue, There the Railroad Company had located its right of way within the time prescribed, and while it still had the power to do so, and the Court held that such location related back to the date of the act making the grant. and cut out intervening claims.

But the effect of such authorized location was to vest an estate in the lands covered by the right of way in the Railroad Company and bring the case within the rule as to forfeiting vested interests for breach of subsequent conditions. That a valid location pursuant to the authority conferred by the act making such a grant is necessary to vest an interest in the particular tracts of land is undeniable. This proposition is conceded everywhere.

Van Wyck *v.* Knevals, 106 U. S., 360.
Savannah, F. and W. Ry. Co. *v.* Davis (Fla.), 7 So., 29.

An expression in the opinion of this Court in Schulenberg *v.* Harriman, 21 Wall., 44, is cited in the opinion of the Court below in the present case as favoring the conclusion there announced.

But there was no issue in that case involving the point, and what is said there as to the continuance of a power to sell in the face of an explicit prohibition in the act creating the power is simply *obiter*.

But in that case there was a vested estate in the lands granted to sustain the power of sale, which may have been deemed sufficient in itself for the purpose.

It is difficult to perceive how the exercise of the power of sale, after the default upon which it is limited, could be justified under the act itself, which is absolutely prohibitory. And evidently this was not the view of the writer of the opinion. For he had already declared that

the State held this power of sale in trust, and subject to all the restrictions and limitations contained in the act, and that a sale in violation of any of these would be void and pass no title. Now, the absolute prohibition upon the exercise of this trust power in the specified contingency must have the same effect.

But if the continuance of a power to sell could be predicated upon the existence of the legal title in the grantee in that case, the principle would not apply to the present case, where no such estate has ever been created.

ESTOPPEL.

The Defendant is Estopped from Denying Plaintiff's Title or Asserting a Superior One.

The second ground relied on by plaintiff to avoid the defense interposed is that of estoppel.

The complaint alleges, and the separate defense in the answer demurred to admits, in effect, that defendant went into possession of the portion of plaintiff's ditch crossed by its railroad track under a deed from plaintiff and his tenant in common for the consideration of $250 paid, and assenting to the condition therein against impairing or destroying said ditch, the only right conveyed being a license "to enter on said ditch and construct and operate its railway over the same" upon said condition. (See Opinion of Court below, Record 17.) The complaint further alleges that defendant utterly destroyed the ditch in violation of this condition. (*Id.*) And this, too, the defense admits.

The acceptance of possession under this deed, it is submitted, created the relation of landlord and tenant between them, and not that of vendor and vendee, so far as the doctrine of estoppel is concerned. The plaintiff still retained his interest in the premises, and the defendant assumed the obligation of preserving his ditch and doing nothing to injure it or obstruct the flow of water

through the part thus delivered into its possession. In these stipulations and conditions there was an agreement, in *legal effect*, that the violation of these essential conditions by the defendant was an event upon the occurrence of which there was to be a surrender of that possession.

Osterhout *v.* Shoemaker, 3 Hill, 518.

Its attempt to set up its own title is a "violation of that contract by which it obtained and holds possession, and breaking that faith which it has pledged, and the obligation of which is still continuing and in full operation."

Blight's Lessee *v.* Rochester, 7 Wheat., 547.

The fact of its having taken this conveyance on such a condition shows that it was then conscious of having forfeited all its rights under the act of Congress granting it a right of way, and that it had no hope of getting possession in any other way, and its present claim to the contrary is clearly an after-thought.

The deed having been accepted by defendant and possession taken under it, it is as effective to raise the estoppel as if formally executed by defendant.

Atlantic Dock Co. *v.* Leavitt, 35 N. Y., 35.

And defendant can no more aver title in itself to defend this action than title in another.

Jackson *v.* Ayers, 14 Johns., 224.
Jackson *v.* Walker, 7 Cow., 635.
Phelan and Wife *v.* Kelly, 25 Wend., 392.
Morrison *v.* Bassett, 26 Minn., 235.

If it is held, as it is confidently believed it must be, that the relation of landlord and tenant was created between plaintiff and defendant, then it is clear the defendant is estopped from denying plaintiff's title or asserting

an outstanding superior title so long as it retains possession of the premises and continues to enjoy the license granted, and especially must this be so after it has violated the terms of the agreement under which it entered.

The rule that a tenant is estopped from denying the title of his landlord while he remains in possession is too well settled to require either authority or argument.

Angel on Limitations, sec. 472.

Blight's Lessee *v.* Rochester, 7 Wheaton, 535.

Angel on Limitations, *supra*, says: "On general principles the tenant is not permitted to dispute his landlord's title. Having entered under that title, he cannot set up an adverse title to protect his possession."

In the case of Morrison *v.* Bassett, 26 Minn., the plaintiff and defendant on the first day of April, 1869, entered into a written agreement of that date purporting in terms to be an indenture of lease, but in fact an instrument in writing not under seal, whereby the plaintiff leased and let unto the defendant certain premises therein described upon the terms and conditions and for an annual rental therein stated, payable quarterly in advance. The term was for a period of five years, and it was stipulated that the lease should be renewed for another term of a like period upon a yearly rental therein named, differing in amount from the first, but payable quartely in advance, and in other respects alike in its terms and conditions. In this agreement the defendant stipulated for himself and assigns to accept of the condition stated, paying rent when due. Upon the execution of this agreement the defendant thereupon entered into the use, possession, and occupancy of the premises, and continued to occupy them, paid the stipulated rent for a time—the whole of the first term and including the first payment of the second term—after which he failed and refused to make any further

payment, and the action was brought to recover the unpaid quarterly installments accruing and falling due on and prior to April 1, 1878. On these facts—I quote from the opinion—the Court held as follows:

"The defendant cannot defeat a recovery for rent accruing and falling due during the term and while he remained in possession of the demised premises or any part thereof by controverting the title of the plaintiff thereto and setting up title in himself to any portion thereof acquired prior to the demise. (Vernan *v.* Smith, 15 N. Y., 327; Sharpe *v.* Kelley, 5 Denio, 431; Allen *v.* Chatfield, 8 Minn., 386–435; St. Anthony Falls Water Power Co. *v.* Morrison, 12 Minn., 249.) And this in substance is the only matter sought to be interposed as a defense in this item."

Under the Exceptional Circumstances of this Case the Defendant is Estopped, though the Relation were that of Vendor and Vendee.

But, conceding for the argument that the relation of landlord and tenant did not exist, but rather that of vendor and vendee, we still insist the defendant is, under the exceptional circumstances of this case, estopped from controverting plaintiff's title, under which it took possession of plaintiff's ditch and destroyed it, contrary to its agreement.

THE DEFENDANT HAVING ACCEPTED THE DEED IS BOUND BY THE TERMS OF THE DEED AS EFFECTUALLY AS THOUGH IT HAD BEEN SEALED AND EXECUTED BY HIM.

A deed executed by one party only, but containing a covenant on the part of the other to perform certain acts, binds the latter if he accepts the deed and takes possession under it as effectually as if he had signed it.

Spalding *v.* Hollenbeck, 35 N. Y., 204.
Herman on Estoppel, vol. 2, sec. 589, p. 723.

Thus, when land is conveyed with a reservation that

the grantee shall maintain suitable fences upon the lines of the premises, and the grantee accepts the deed, he is bound to perform the service.

Harriman *v.* Park, 55 N. H., 471.

Herman on Estoppel, vol. 2, sec. 589, p. 723.

The Court, Earle, Chief Justice, in the case of Atlantic Dock Company *v.* Leavitt *et al.*, 54 N. Y., in discussing the question as to whether the grantee in a deed who himself did not sign the deed was bound by its covenants, conditions, &c., therein mentioned to be by him performed, said:

"I have found no authority holding that the grantee in such a deed—a deed poll—is not bound by the covenants therein mentioned to be performed by him in some form. It has, however, been held in some cases that the technical action of covenant could not be held against such a grantee, because he had not sealed the deed. (Hinsdale *v.* Humphrey, 15 Conn., 432; Burnett *v.* Lynch, 54 Barn. & Cress., 589; Maule *v.* Weaver, 7 Penn., 329; Platt on Covenants, 18.) But I apprehend the preponderance of authority is the other way. Platt, after reviewing the cases and laying down the law as he claims it to be, says: 'Perhaps, however, the doctrine has been too long sanctioned that such an action can be maintained to be now reversed. At all events, it is an introduction of an equitable principle into a court of law, the acceptance of a deed being considered equivalent to an actual execution by the lessee.'"

In Richards *v.* Eagle Fire Company, 9th Wend., 618, the Court said:

"Whoever takes an estate under a deed ought in reason and equity to be obliged to take it under the terms expressed in the deed."

In Comyn's Digest, title "Covenant A 1," it is said that "If a lease be to A and B by indenture, and A seals a counterpart and B agrees to the lease, but does not seal, yet *B* may be charged for a covenant broken."

In Belmont *v.* Coman, 22 N. Y., 428, Judge Comstock says:

"It needs no authority to prove that if in the conveyance there are words importing that the grantee will comply with certain conditions in the deed he is deemed to have entered into an express undertaking to do so, although he does not sign or seal the instrument. The acceptance of a deed containing such language is evidence of the most satisfactory kind that he has promised to do what the deed says he is to do."

In Spalding *v.* Hollenbeck, 35 N. Y., 206, the Court said:

"The grantee having accepted the deed and taken possession under it is bound by the covenants therein contained as effectually as if he had signed it."

The Court in The Atlantic Dock Company *v.* Leavitt *et al.*, 54 N. Y., *supra*, in discussing the question whether a grantee who had not signed the deed, could be sued for a breach of a covenant in such deed after discussing what seemed to be something of a controversy upon that particular point as to the form of action and having come to the conclusion that an action for breach of covenant would lie, concludes as follows:

"But if I am wrong in all this, I find no authority against the maintenance of this action to restrain the defendants from doing what plaintiff's grantee under whom they hold agreed he would not do." (The action in that case being one brought to restrain defendants from using certain premises situated in the City of Brooklyn for the manufacture of resin oil.) "All the authorities agree that *some* form of action, either in assumpsit, case, or equity can be maintained. If the action were against Worcester, I am unable to see any objection to its maintenance. He would be held bound by the agreement contained in the deed which he accepted.

The deed would be held to be evidence that he had made the agreement therein contained. And upon the theory that it was not an agreement upon his part under seal he could have been sued for any breach of it, in what was formerly called an action of assumpsit, or an action on the case; and a court of equity would restrain him from doing what he had agreed not to do. The agreement qualified the estate which he took and attached itself to that estate."

The old common-law rule that the estoppel cannot be broader than the deed and that in unilateral instruments to which one party only sets his seal the grantor only is estopped, while the grantee is not, is not applicable in our system of jurisprudence and all the authorities are to the contrary.

Atlantic Dock Co. *v.* Leavitt *et al.*, 54 N. Y., 35.
Bigelow on, Estoppel 356, and authorities there cited.
Coke on Littleton, 47.

Herman on Estoppel and Res Judicata, vol. 2, sec. 591, says:

"The grantee of a deed *inter partes* is bound by the conditions, covenants, and stipulations therein on his part, although the deed is only signed by the grantor. If they are such as are legally sufficient to create an easement in the premises granted, the grantee takes the land subject to that servitude."
Miller *v.* Winchell, 70 N. Y., 437.

Acceptance of an indenture binds the grantee without execution.
Herman on Estoppel and Res Judicata, vol. 2, 724 and 725, and authorities there cited.

The acceptance of a deed poll works an Estoppel upon

the grantee in the case of a demise and covenants intended for him.

Bigelow on Estoppel, 356 and 357.
Atantic Dock Co. *v.* Leavitt, 54 N. Y., 35.

It is conceded that the rule is well established that *ordinarily* or *generally* a vendee is under no obligation to support his vendor's title, and therefore is not in such case estopped from denying the same. But to this general rule there are many well-recognized exceptions, and to some of these attention will be attracted. And it is respectfully submitted that should it be held in this case that the relation of landlord and tenant as between the parties to this suit was not established by the acceptance of the deed mentioned in the complaint and the payment of the $250, that then this case on the admitted facts comes clearly within the exceptions to the general rule and under which exceptions the defendant is estopped from denying plaintiff's title.

The learned judge who tried this cause in the Court below frankly admits in his opinion delivered in the case (Record, 18) that a vendee will not be permitted to deny his vendor's title when by so doing his act would be repugnant to his acceptance of the grantor's deed, or a claim under it.

The reason assigned by Courts, and notably by Chief Justice Marshall in the celebrated case of Blight's Lessee *v.* Rochester, 7 Wheat., 535, for the general rule that a vendee is not estopped from denying the title of his vendor is, that a conveyance having been executed by the vendor free from any conditions or covenants to be performed by the vendee the *vendor's title is extinguished* in law and in equity. The vendee acquires the property for himself *exclusively* and he is under no obligations to maintain the title of the vendor. The relation of landlord and tenant in such a case does not exist, either in a

qualified form or in any degree whatever. The vendee in such a case holds adversely to his grantor and may treat him as a stranger to the title. In such a case the property, and the *whole* property, and *all the estate* therein owned or possessed by the vendor having become vested in the vendee, be it good or bad, much or little, legal or equitable, he, the vendee, has a right to fortify such title by the purchase of any outstanding title which may protect him in the enjoyment of the premises. As stated by the late Chief Justice Marshall in Blight's Lessee *v.* Rochester, 7 Wheat., 535—

"No principle of morality restrains him from doing this" (that is to say, from denying his vendor's title), "nor is either the letter or spirit of the contract violated by it."

Averill *v.* Wilson, 4 Barb., 180.
Bigelow on Estoppel, 358, and note.
Blight's Lessee *v.* Rochester, 7 Wheat., 535.

The Exceptions.

But the case under consideration is widely different from the class of cases just quoted. In substance and legal effect, so far from being a conveyance of all plaintiff's estate in the premises, the facts, as stated and admitted in the pleadings, clearly show that the transaction between the parties was in substance and legal effect an agreement in writing under seal, whereby for a certain consideration paid and received the defendant was admitted, not to an exclusive ownership or possession of the premises in question, but simply to a participation in their use with that of the plaintiff, and containing, moreover, certain stipulations and covenants binding on the defendant to the effect that the use of the same on the part of the defendant should be conducted in such a manner as not to interfere with plaintiff's use therein for the purposes for which it was at the date of such agreement then being used by the plaintiff. Such is the

case presented by these pleadings, and it is thus, it is confidently submitted, brought clearly within the exception to the *general* rule, which we concede, that a vendee is not estopped from denying his vendor's title.

It will be perceived that in this case every reason upon which the right of a vendee to deny his vendor's title is based is lacking. It cannot be said in this case that the vendee owes no faith or allegiance to the vendor; neither can it be said that the title of the vendor is extinguished; nor can it with truth be said, as in an ordinary case of vendor and vendee, that the vendee, the defendant, does no wrong by treating plaintiff as a stranger to the title by controverting that title.

The attempt in this case upon the part of the defendant to deny plaintiff's title by setting up another in itself is similar to the case of a grantee of lands while holding possession under his grantor attempting to dispute his grantor's title for the purpose of escaping the payment of the purchase price of the same; and this the Courts have universally held will not be permitted.

Peters *v.* Brown, 98 U. S., 56.
Robertson *v.* Pickerell, 109 U. S., 608–615.
McCaniha *v.* Fales, 107 N. Y., 404.
York *v.* Allen, 30 N. Y., 104.
Crum *v.* Wright, 97 Mo., 1319.
Munford *v.* Pearce, 70 Ala., 452.
Small *v.* Reeves, 19 Ind., 163.
Marsh *v.* Thompson, 102 Ind., 272.
Bigelow on Estoppel, 357.

Again, the case at bar is not unlike, in the attempt on the part of the defendant to dispute plaintiff's title, the case of a person who has accepted a deed with covenants of seizin, and who then turns upon his grantor and claims that his covenants are broken by reason of

the fact that he himself at the time he accepted the deed was seized of the premises. This latter the Courts will not permit, and this is an exception to the general rule that a vendee may controvert the title of his vendor.

Fitch *v.* Baldwin, 17 Johns., 161.
Bee Bee *v.* Swartwout, 3 Gilman, 162, 179.
Furners *v.* Williams, 11 Ill., 229.
Bigelow on Estoppel, 357.

And again there is another exception to the general rule which permits the grantee to deny his grantor's title, which goes on all fours with the case at bar, and that is that a grantee in a deed poll who has accepted the deed and estate will not be permitted to deny his covenants or claims that the seal attached is not his, in an action on the covenants.

Atlantic Dock Co. *v.* Leavitt, 54 N. Y., 35.
Rigelow on Estoppel, 357.

But a conclusive answer to the claim of defendant that it is not estopped from denying the title of the grantor is found in the following well-recognized rule:

While the general rule is well established that the grantee ordinarily is not estopped to deny the grantor's title, this rule is not applicable to a case in which the only title asserted by the grantee is the precise title he has acquired from the grantor, nor to a case where both parties claim from a common source and the title is identical in that source.

Herman on Estoppel, 2d vol., sec. 603, p. 738.
Wilcoxon *v.* Osborn, 77 Mo., 621.

It is submitted this case comes within both of the exceptions named in the last proposition. In the first place, it will be perceived that the only title asserted by the grantee, the defendant herein, is the precise title acquired by the defendant from the grantor, viz., the right

of way to construct and operate a railroad and telegraph line over the land in question. This is the only right, the only title, the only interest or estate, claimed by the defendant, the railroad company, in the premises in controversy in virtue of the act of Congress of July 25, 1866, and this is the precise title the defendant acquired from the plaintiff in virtue of the deed of conveyance referred to and described in the complaint and admitted in the latter part of the separate answer of the defendant.

But not only so. In this case both parties, plaintiff and defendant, claim title to the premises in question, or whatever estate they each do claim therein, from a common source—the United States—each claiming under and by virtue of an act of Congress, and the title claimed by each, it must be conceded, was identical in that source, viz., the United States.

In Wilcoxson *v.* Osborn, 77 Mo., the Court said:

"I am well aware our Supreme Court has by repeated decisions laid down the doctrine that the relation of vendor and vendee is antagonistic and that the vendee is not estopped from denying his vendor's title." (Quoting several authorities). "It will be found on examination of these cases that they are to the effect that an estoppel cannot be invoked against the right of the grantee to set up an outstanding or after-acquired title or a title under the limitations by which to fortify his position. But this rule is not applicable to a case in which the only title asserted or claimed by the grantee is the precise title he has acquired from the grantor. Bigelow on Estoppel, 2d Ed., 355. Neither has it been applied to a case in which both parties claim from a common source and the title is identical in that source."

Brown *v.* Brown, 45 Mo., 412.

The rule is well settled that if the grantee assert no other right or title than that from the common grantor he will be precluded from denying that his grantor had title when he conveyed.

Bigelow on Estoppel, 346, and authorities there cited, among the number the following:

Brazee *v.* Schofield, 124 U. S., 495–503.
Cummings *v.* Powell, 97 Mo., 524.
Pendley *v.* Madison, 83 Ala., 484.
Robertson *v.* Pickrell, 109 U. S., 608–615.
Keith *v.* Keith, 104 Ill., 397.
Wobuma *v.* Henshaw, 191 Mass., 195.
Grandtower Mowing Company *v.* Gill, 111 Ill., 541.

In the case of Phelan *v.* Kelly, 25 Wend., 392, a man named Bond, having a wife and several children, including two boys—Samuel and Joseph—had been in possession for many years of a tract of land, but to which neither he nor they had title. The husband deserted his family; the wife and children remained in possession, cultivating the land. While the children and mother were thus all residing together on the land and before the death of the father the two boys—Samuel and Joseph—bought in the outstanding title. Subsequently the father died, and one of the daughters and her husband (Phelan) brought ejectment against the assignees of Samuel and Joseph Bond, claiming her one-sixth part of the land, there being in all six heirs. The defendant Kelly, the assignee of Samuel and Joseph Bond, defended by attempting to set up the outstanding title bought in by his grantors, Samuel and Joseph. This the Court held he could not do, and in its opinion said:

"The defendant stands in no better condition than Samuel and Joseph, and the main question is whether they could set up an outstanding title under the circumstances of the case to defend a possession thus acquired in common with the other children to the exclusion of the latter. I am of opinion they cannot. They must first surrender possession and assert their subsequently acquired title, if they have one, by ejectment.

"The rule of law that a person coming into possession of lands under the agreement or license of another cannot be permitted to deny the title of the latter when called upon to surrender is of almost universal application.

Even if he had a valid title at the time, he is deemed to have waived it and as between the parties to have admitted title in the person under whom he entered. (7th Cow., 637; 3 Ad. and Ell., 188; 2d *Id.*, 17.) In one of these cases the King's Bench held that the rule applied to the case of a license to enter for a temporary purpose. Dunham, Ch. J., said:

"'The defendant thereby waived any title which she might previously have been able to assert; she held possession through a license, whether for a longer or shorter time was immaterial.

"'She cannot claim against the party by whom she was let in; that party as between them has the title.'"

The Court, in further discussing this case, says:

"It was strongly urged by the learned counsel for the defendant that a person in possession may purchase in an outstanding title for the purpose of strengthening his own, and that Samuel and Joseph had done nothing more. The principle I admit to the fullest extent, with this qualification, namely, that the possession has not been taken under circumstances that preclude him from disputing the tittle of the party claiming. The rule to which I have already adverted necessarily annexes this exception. * * * What I contend for is that one of the co-heirs, having derived his possession from the common ancestor, as well as through his co-heirs, is disabled, while standing upon his possession, from disputing their title. I do not deny but the title thus attempted to be set up may be valid, nor but that the party may avail himself of it after surrendering their possession."

The case now before the Court is in effect and in fact an action for damages on account of an alleged breach of the defendant's covenants to so use the premises in question in constructing and operating its railroad that, as stated in the complaint, "it should not in any way injure or destroy said water-ditch, or impair or obstruct the use or enjoyment of said water-ditch by the plaintiff or said Daniel Fisher, as a means of conveying water

through or along the same, by any act or acts on its part in constructing, maintaining, or operating its railroad or telegraph line over or across the said water-ditch."

The doctrine of estoppel, both by deed and *in pais*, was quite fully discussed by this Court, Mr. Justice Field delivering the opinion, in the case of Robertson and others *et al. v.* Pickerell, 109 U. S., 608. In that case Mr. Justice Field, after stating the general rule that a vendee is not estopped from disputing the title of his vendor, says:

"To this general statement of the law there is the qualification that a grantee cannot dispute his grantor's title at the time of conveyance so as to avoid payment of the purchase-price of the property; nor can the grantee in a contest with another, whilst relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor, or through him, is sufficient for his protection and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance.

Ives *v.* Sawyer, 4 Dev. and Bat. Law, 51, and
Gilliam *v.* Bird, 8 Iredell Law, 280.

The case of Board *v.* Board, to which counsel refer, was decided upon similar grounds."

The Court, proceeding further in discussing the above case, says:

"With exceptions or limitations of this character it will be found on examination of the authorities, particularly those of a modern date, that the doctrine of estoppel *in pais*, however it may have been applied formerly, cannot now be asserted to preclude the grantee from denying his grantor's title and acquiring a superior one *unless there exists such a relation of the parties to each other as would render the proceeding a breach of good faith and common honesty.* No such relation exists between grantor and grantee in an *absolute conveyance without recital or*

covenant, whether it be of the fee or of an estate for life. * * * Covenants in the instrument intended for him, such as to restore and surrender the premises on the termination of a life estate, or recitals declaring the reversion to be in the grantor or others, would of course change the relations of the parties. Obligations from such covenants or recitals might arise which would control the action of the grantee. (Atlantic Dock Co. *v.* Leavitt, 54 N. Y., 35.) Here, as already stated, there is nothing of the kind."

The case of Jackson *v.* Ayres, 14 Johns. Reports, *supra*, which was a case wherein the plaintiff rested his right to recover the premises in question on a covenant or agreement entered into between Jonathan Brown and the defendant, by which the defendant agreed to purchase the lands of Brown, the defendant then being in the possession of the same, and offered to prove that one Dobkins was in possession of the premises forty years ago, claiming title, and that the defendant was now in possession claiming under him and had a deed from his heirs. The testimony was overruled. The defendant offered to show an outstanding title in Isaac Rogers. That was also overruled, and verdict found for the plaintiff. The Supreme Court, in reviewing the case, said:

"The agreement entered into for the purchase between Brown and the defendant was dated in the year 1810." (This opinion was delivered in 1817.) "This agreement to purchase was an acknowledgment of the title of Brown and estopped the defendant from setting up an outstanding title. The defendant being in the possession when the agreement was entered into, could make no difference. He was in as a mere naked possessor and must be considered in the same light as if he had entered under the agreement. He did not offer to show that he entered under Dobkins, or how long Dobkins continued in possession, but merely that Dobkins had possession, claiming title, forty years ago; and that he, the defendant, *now* claims title under him and had a deed from his heirs. When he obtained such deed or when he first pretended

to claim under Dobkins is not stated, it is most probable that it was after he entered into the agreement to purchase of Brown; so that on this ground the evidence was properly rejected; and, indeed, the defendant was estopped, admitting even that he entered under Dobkins and had a deed from his heirs at the time he agreed to purchase of Brown, unless he was in some way deceived or imposed upon in making such agreement. The offer to show an outstanding title in Rogers was clearly inadmissible."

The Defendant is not only the Tenant of Plaintiff in respect of the Estate conveyed to it, but is Tenant in Common with Plaintiff as to the Ditch Property and Water Rights in which each held a Separate Estate, but Joint Possession.

By acceptance of the deed by defendant from plaintiff and its entering into joint occupancy with the plaintiff of the ditch and the water-rights covered by the deed and in pursuance of it, the defendant became not only the tenant of the plaintiff as to the estate or interest purchased, but it and plaintiff became tenants in common, each having a right to the use in different forms of the same identical piece of property. This relation having been established, it is not within the power of the defendant, while still continuing in such possession and use, to contest the title of the plaintiff by which he was admitted to it, or set up an outstanding title as against his tenant in common, who is *also* his landlord in respect of the estate transferred by the deed to defendant.

Phelan and Wife *v.* Kelly, 25 Wend., 395.
Jackson *v.* Herman, 10 Johns., 292.
The Poprietors of Baintree *v.* Battles, 6 Vern. R., 395.

By the laws of Oregon (Hill's Annotated Laws of Oregon, vol. 2, p. 1352) joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common.

While it is provided further (General Laws of Oregon, pp. 231–2) as follows:

"If any tenant in severalty or in common, for life or for years, commit waste, he is liable to the party injured, in an action at law, for damages, in which treble damages may be recovered."

All persons, natural *and artificial*, capable of acquiring property, real or personal, may become tenants in common with one another.

Freeman on Co-tenancy and Partition, sec. 90.
DeWitt *v.* San Francisco, 2 Cal., 298.
N. Y. & S. Canal Co. *v.* Fulton Bank, 7 Wend., 412.

A tenancy in common may exist in any species of property, real, personal, or mixed. Two persons, therefore, may be tenants in common of a fixture, or the right to use or convey water in a ditch. So, too, a franchise may be held by two or more persons as tenants in common.

Freeman on Co-tenancy and Partition, sec. 88.
Hill *v.* Hill, 43 Penna. State R., 521.
Harven *v.* Mehlgarten, 19 Ill., 95.

There was never any doubt that if either co-tenant destroyed the property of the co-tenancy the other might have an action of trespass, and the offending co-tenant is estopped from assailing the title of his co-tenant.

Freeman on Co-tenancy, sec. 298.
Coke on Littleton, 200 *b*.

Where there has been such acts on the part of the co-tenant as amounts to an ouster or a destruction of the common property, one co-tenant may maintain an action against his co-tenant.

Id., sec. 299.

In discussing the case in 25 Wend. the Court say:

"It is very clear that it is not competent for the defendant to resist the rights of his co-tenants by setting up an adverse title in a stranger."

The Question of Estoppel is properly raised by The Demurrer.

When the matter which operates as an estoppel appears on the face of a pleading the opposite party may demur to a plea by which the defendant attempts to set up such matter as a defense.

Oregonian Railway Co. *v.* Oregon Railway Co., 10 Saw., 464.

Bigelow on Estoppel, 5th ed., 707.

Thus, if in covenant on a lease by the lessor the defendant plead *nil habuit in tenementis*, that is, in effect, that the lessor had no title or interest in the land, the plea will be bad, because the matter of estoppel, to wit, devise by deed and the holding thereby, appears in the declaration. *Id.*

The Law of Estoppel neither Unjust nor Absurd.

While it has seemed common for lawyers, and some times Courts, to speak of the doctrine of estoppel, as is often the case also in reference to the doctrine of forfeiture, as being odious and one not to be favored by Courts, it may be well to recall a suggestion on the other side of the case ventured by Judge Taunton, in Bowman *v.* Taylor, 2d A. D. and E., 278, as follows:

"The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is that when a man has entered into a solemn engagement by deed under his hand and seal as to certain facts he shall not be permitted to deny any matter which he has so admitted or asserted."

Bigelow on Estoppel, 368.

In conclusion, it will not do to assume in this case, as did the Court below, that the plaintiff had no other or better title than mere possession, or that defendant took nothing by the conveyance accepted by it and under which *alone* it acquired possession, although even if such were the facts the estoppel must prevail. The Court below, Judge Deady, in his opinion (Record, 20), says: "Here the defendant derived nothing from the plaintiff." And again: "From the facts stated in this defense it clearly appears that the defendant took nothing by the conveyance from the plaintiff," while the fact is the averments of the complaint are "that the plaintiff was on September 3, 1883" (the date of the conveyance), the owner in fee of an undivided one-half interest in the water-ditch and water-right connected therewith in controversy, and was on that date "in the lawful and peaceable possession of the same as a tenant in common therein with Daniel Fisher." (Record, 51.)

In the second defense demurred to this is not denied. It is not denied that plaintiff was then the owner in fee as alleged. It is not pretended the defendant did not take possession under the deed from plaintiff. It is not claimed that defendant located its line or constructed its road within the time required of it by the act of Congress. It is not averred, either directly or by implication, that the act of defendant in locating its line and constructing its road over plaintiff's ditch was ever recognized by the Department. From aught that appears in such defense as pleaded plaintiff at the date of such conveyance held a U. S. patent for the lands occupied by the ditch in question. The fact that it is admitted that the road was not located or constructed within the time required; also that plaintiff was in possession; that defendant treated with him as the owner and accepted for a money consideration a conveyance for a license to locate and construct its road over a ditch already constructed, is, so far from being a

denial of the averment in the complaint that the plaintiff was the owner in fee of said premises, an unqualified admission of the same, and in the absence of fraud or misrepresentation—and nothing of the sort is alleged—an admission which the defendant is estopped from now controverting.

But not only so. The separate defense contained in the answer, and to which alone the demurrer is interposed, is put forward by defendant as an answer, claimed and intended to be full and complete in itself, to every material allegation in the complaint, and assumes all such material allegations to be true. This is the rule of the State of Oregon, and is recognized and governed by the Federal courts in that State.

Hill's Code, vol. 1, secs. 72 and 77.

It must be observed that while it is true there are certain formal denials in the first part of defendant's answer to certain allegations of the complaint, the legal effect of each and all of these denials is dissipated by the statements, averments, and admissions of the separate defense set out in defendant's answer. In other words, this separate defense nowhere claims in terms, or, indeed, by fair inference, that the defendant, the railroad company, took possession of the premises in question, constructed and operated its road across the same in pursuance of the act of Congress of July 25, 1866, granting it a right of way. Upon the contrary, it is conceded by the answer, taken as a whole, clearly and indisputably, that on the 3d day of September, 1883 (Record, 5), the plaintiff was the owner in fee of an undivided one-half interest of the premises in question, and was in the lawful and peaceable possession of the same as a tenant in common therein with one Daniel Fisher. It is further conceded in the answer, taken as a whole, that the defendant on that date, in order to obtain possession of the water-ditch and the

premises described for the purpose of enabling it to construct and operate its road across the same, paid plaintiff and said Daniel Fisher the sum of $250, taking from them a deed authorizing it to enter into possession of said water-ditch and premises and construct, maintain, and operate its railroad and telegraph line over and across the same, but upon the condition that it should not in any way injure or destroy said water-ditch or impair or obstruct the use or enjoyment of the same by the plaintiff or said Daniel Fisher. And it is further admitted that *in pursuance of this arrangement and agreement* the defendant corporation *entered into possession of such premises* and constructed and operated its road across the same, and *not* in pursuance of the act of Congress referred to. That the idea of any right to the possession of such premises by virtue of the act of Congress referred to was clearly an after-thought fully and clearly appears from the pleadings in the case.

It is further conceded in the case (see opinion of Judge Deady, Record, 17, also defendant's answer, Record, 9) that the plaintiff as tenant in common with said Fisher had taken possession of the land in question and constructed the water-ditch referred to under and by virtue of the act of Congress approved July 26, 1866 (14 Stats., 253), entitled, "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes."

One making a contract to buy land and taking possession under such contract, though strictly the relation of landlord and tenant is not thus created, yet the vendee in ejectment by the vendor against him is absolutely estopped from either showing title in himself or setting up an outstanding title in another.

Jackson *v.* Walker, 7 Cow., 637.

The point sought to be impressed on the Court is this:

The defendant went into possession of the premises in controversy under and in pursuance of a contract agreement or deed, whatever it may be called, from the plaintiff and his tenant in common with the right to use the same for a certain purpose, namely, the construction and operating of a railroad, conditioned, however, that such use should be so conducted as not to interfere with other rights and interests therein retained by plaintiff, and still remains in possession, and so long as this state of the case continues the defendant is estopped from controverting the right of the plaintiff to admit him to possession, or the title of the plaintiff under which he entered.

All of which is respectfully submitted.

JOHN H. MITCHELL,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 276.

WILLIAM BYBEE, Plaintiff in Error,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR DEFENDANT IN ERROR.

J. HUBLEY ASHTON,
CHARLES H. TWEED,
Counsel for Defendant in Error.

Supreme Court of the United States.

October Term, 1890. No. 276.

WILLIAM BYBEE, PLAINTIFF IN ERROR,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of Oregon.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

This is a writ of error to the judgment of the Court below in an action brought by William Bybee, the plaintiff in error, against The Oregon and California Railroad Company, a corporation organized under the laws of the State of Oregon, in the Circuit Court of Oregon for Jackson County, and removed into the Court below as a suit arising under the laws of the United States.

The plaintiff, in his complaint, alleged that on the 3d of September, 1883, he was the owner in fee of an undivided half interest in 'a certain water-ditch and water-right on the south side of Rogue River, in Jackson county, Oregon, and in possession of the same as tenant in com-

mon with one Daniel Fisher; that on that day he and Fisher, for the consideration of $250 to them paid, executed a deed to the defendant, conveying to it the right to enter upon the said water-ditch, and construct and operate its railroad and telegraph line over and across the same, but upon the condition that it should not injure or destroy the water-ditch, or impair or obstruct the use or enjoyment of the same by the grantors; that the defendant assented to the said condition, and received possession of the water-ditch under the said deed and upon the said condition; that the defendant, nevertheless, constructed its railroad and telegraph line across the water-ditch in such manner as to permanently obstruct and destroy the same and render it impossible to convey water along it at the point where the railroad crosses the same; that the defendant has appropriated the portion of the water-ditch where its railroad and telegraph line crosses the same to its own exclusive use; and that thereby his interest in the said water-ditch has been destroyed, to his damage in seven thousand dollars. (Record, pp. 5, 6.)

The corporation defendant, in its answer, after traversing sundry allegations in the complaint, set forth as a further and separate defense to the action, certain facts showing, as alleged, a paramount right of way in itself over the land through which the said water-ditch was constructed, under the grant to it of the right of way for the construction of its railroad and telegraph line from the City of Portland to the California line, on the southern boundary of Oregon, made by the act of Congress of July 25, 1866, entitled "*An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon.*"

Separate Defense, Answer, Record, p. 8, folio 14, to p. 10.

The facts stated in this defense are, in substance, these:

The defendant was incorporated to construct and operate a railroad and telegraph line from Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue river valleys, to the California line, on the southern boundary of Oregon.

By section 3 of the act of July 25, 1866, above mentioned, there was granted to it, *inter alia*, the right of way through the public lands of the United States, to the extent of one hundred feet in width, on each side of the said railroad where it might pass over those lands. (14 Stats., 240.)

The lands through and over which the portion of the said water-ditch, alleged to have been injured by the defendant, was constructed and is situated, were, at the date of the said act of Congress of July 25, 1866, public lands of the United States, over and upon which the defendant had the right, by virtue of the grant made in that act, to locate its said right of way and construct its said railroad and telegraph line.

In selecting and locating said right of way, and constructing said railroad and telegraph line thereon, it became and was necessary for the defendant, in the proper and convenient selection and location of said right of way, to appropriate to its use and benefit a portion of the said public land, one hundred feet in width on each side of said railroad, through and over which said land the portion of the said water-ditch alleged to have been injured by the defendant, was located and constructed.

The defendant did accordingly locate its said right of way for said railroad and telegraph line upon and over said portion of said public land so granted to it for said right of way, and being the same ground over and through which the said portion of said water-ditch was located and dug, and did construct its said railroad and telegraph line on and over said right of way as so located.

Any injury to said ditch was done upon that portion thereof which has been so dug and constructed upon and in said right of way land, and in the course of the construction and operation of the defendant's railroad and telegraph line thereon, and not otherwise.

On May 17, 1879, the said Daniel Fisher attempted to appropriate to his own use, under the mining laws of the United States, a portion of said right of way, and dug and constructed said ditch in and upon said right of way land.

The only claim of right, interest or property ever made or pretended to be owned by said Fisher, is to said land constituting a part of said right of way, and in and through which said ditch was located and constructed, and the only claim of right on his part there to locate and dig that portion of said ditch, was claimed and pretended by him to have been obtained by virtue of his said pretended compliance with certain provisions of the said mining laws.

The said Fisher never did in fact have any other right, interest, or ownership in said land, nor any right to dig said ditch in or through the same, than such right as he attempted to acquire by such pretended compliance with said provisions of the mining laws of the United States.

The plaintiff never had or claimed to have any right, interest, or property in the said land over which the said portion of the said water-ditch was so located and constructed, except such as he claims and pretends to have acquired under and through Fisher, and all his alleged interest and ownership in said ditch was claimed and pretended to be acquired by him from, through, and under Fisher.

The defendant took nothing by the deed in the complaint mentioned, as it then owned, by virtue of the said grant of the United States, all the rights and prop-

erty pretended to be conveyed by the said deed, and the defendant never received any consideration whatever for the sum alleged to have been paid by it for the said pretended conveyance.

The plaintiff demurred to the separate defense thus set up in the answer, upon these ground: *1st.* The defense does not state facts sufficient to constitute any defense to the action. *2d.* The facts stated in the complaint estop the defendant from claiming the right of way, in the separate defense mentioned, or any benefit under the grant of the right of way in the said act of Congress of July 25, 1866, as a separate defense to this action. *3d.* The defendant forfeited all its right under the said grant of the right of way over the land where the said ditch is situated, by its failure to complete its road over said land on or before July 1, 1875. (Demurrer, Rec., p. 10, fol. 18.)

The cause having been removed by the defendant into Court below, it was, on the motion of the defendant, set for hearing on the demurrer to the answer. (Rec., p. 13.)

The Court below overruled the demurrer in an able opinion delivered by Judge Deady, found in the record, which is reported in 11 Sawyer's Reports, 479–488, and also in 26 Federal Reporter, 586.

The plaintiff having elected to stand upon his demurrer to the answer, and not desiring to plead further thereto, the Court below entered a final judgment of *nil capiat* in favor of the defendant, with costs. (Rec., p. 20.)

The plaintiff thereupon sued out the present writ of error.

ARGUMENT.

FIRST.

The interest of the plaintiff in error, if any he ever had, in the land in controversy, was taken and held subject and in subordination to the right of way over the land granted to the defendant in error for the proposed railroad and telegraph line, by the act of Congress of July 25, 1866, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon."

1. The Oregon and California Railroad Company, defendant in error, was incorporated under the laws of Oregon to construct, maintain, and operate a railroad and telegraph line from Portland to the California line on the southern boundary of Oregon, as contemplated by the act of July 25, 1866.

The object of that act was to procure the construction and operation of a continuous railroad and telegraph line from the city of Portland to the line of the Central Pacific Railroad Company, in California; and for that purpose, and to aid in the construction of the proposed public highway, Congress made two distinct and independent grants to the California and Oregon Companies, contemplated by the statute; one of public lands, and the other of the right of way through the public lands to the extent of one hundred feet in width on each side of the railroad where it might pass over the public domain, including all necessary grounds for stations, and other structures required in the construction and operation of the road.

By the 5th section of the act, these several grants were made by Congress upon the condition that the companies receiving them should perform certain public

services for the National Government, and it was expressly ordained that "said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States." (14 Stats. at Large, 241.)

The grant of lands to the defendant in error was made by *section 2* of the act of 1866, as follows:

"That there be and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior, a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified.

"The lands herein granted shall be applied to the building of said road within the States respectively, wherein they are situated, and the sections and parts of sections

of land which shall remain in the United States, within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold." (*Ibid*, pp. 239, 240.)

The right of way is granted, in *section 3* of the act, as follows:

"That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line; and the right, power and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side tracks, turn tables, water stations, or any other structures required in the construction and operating of said road." (*Ibid*, p. 240.)

Section 6 required the companies to file their assent to the act within one year, to complete the first twenty miles of said railroad and telegraph line within two years, and at least twenty miles in each year thereafter, and "the whole on or before the first day of July, 1875."

Section 8 provided that in case the companies should not complete the same as provided in section 6, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the time of any such failure, shall revert to the United States." (*Ibid.*, p. 241.)

The subsequent act of June 25, 1868, chapter 80, amended section 6 of the act of 1866, by providing that "instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph line shall be completed within eighteen months from the

passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, eighteen hundred and eighty." (15 Stats., 80.)

2. Agreeably to the settled doctrines of this Court, as applied and enforced in the construction of similar congressional acts, the grant to the defendant in error of the right of way for its proposed road over the public domain, contained in the act of 1886, is an absolute grant *in præsenti*, without reservations, limitations or exceptions, which took effect upon the definite location of the right, from the date of the act, as against all intervening claims.

Railway Co. *v.* Baldwin, 103 U. S. 429.
Railway Co. *v.* Alling, 99 U. S., 475.
Schulenberg *v.* Harriman, 21 Wall., 44.
Leavenworth, &c., Railroad *v.* United States, 92 U. S., 733.
Missouri, Kansas & Texas Railroad Co. *v.* Kansas Pacific Railroad Co., 97 U. S., 491.
Ryan *v.* Central Pacific R. R. Co., 99 U. S., 382.
Wisconsin Railroad Co. *v.* Price County, 133 U. S., 509.
St. Paul and Pacific Railroad Co. *v.* Northern Pacific Railroad Co., Oct. T., 1890. No. 54.

The words of the 3d section of the act of 1866 are, "that the right of way through the public roads *be, and the same is hereby, granted* to said companies for the construction of said railroad and telegraph line," and that "said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it *may* pass over the public lands," which import, under the authorities cited, a present and absolute grant of the right of way over those lands which

were, at the date of the act, within the designation of public lands of the United States.

The language of the act plainly shows that Congress intended that the grant should operate with full and instantaneous effect from the date of the passage of the statute, upon the *then* public lands of the United States, so that the acquisition of all interests in those lands, after the passage of the act, should be subject and subordinate to the right of way conferred by it for the proposed railroad and telegraph line.

The grant of the right of way in the third section of the act, contains no express reservations, limitations or exceptions, and the fact that none are expressed, is conclusive that none exist.

The limitations which qualify the grant of lands by the second section of the act, cannot be imported, by construction, from that section into the third section, making the grant of the right of way. As this Court, speaking by Mr. Justice Field, observed in reference to a like grant, "had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed." (Railroad Co. *v.* Baldwin, 103 U. S., 430.)

If it was the intention of Congress that the rights of the Company in the great highway proposed to be constructed by it should be taken in subordination to private interests in the land of that highway, acquired after the date of the grant, and before the definite appropriation of the way for the purposes contemplated by the charter of the Company, and the granting statute, undoubtedly Congress would have so declared and provided compensation for the loss of the right of way, by means of such intervening claims, although none could be given by the substitution of another route.

It was not in the contemplation of Congress, when it made this absolute grant of the right of way for the construction of the road over the public domain, that the enjoyment of the rights conferred upon the Company, should be controlled, or interfered with in any manner, by those whose relations to the land were posterior to the grant.

The construction and effect of the grant are so well settled by authority that a discussion of the subject upon principle is supererogatory.

This Court, in the leading case of *Railroad Company* v. *Baldwin* (103 U. S., 426), had occasion to carefully consider and adjudge the effect and operation of a precisely similar grant, by the act of July 23, 1866, c. 212, to the St. Joseph and Denver City Railroad Company, and the principles affirmed in that case are in all respects applicable to the construction of the grant involved in the present case, and are presumably no longer open to discussion by counsel.

The grant of the right of way, in that case, was in terms of a grant *in præsenti*, and the defendant in error acquired the land after the date of the act, and before the definite location of the line of the proposed road.

The Court conclusively adjudged that the grant vested immediately and absolutely upon the passage of the act, and the rights of the defendant in error were taken in subordination thereto.

Mr. Justice Field, in the opinion delivered by him in that case, after stating that the limitations upon the grant of lands to the railroad company in the act were similar to those found in numerous other grants of land by Congress in aid of railroads, and expounding the object and policy of such limitations, said:

"But the grant of the *right of way* by the sixth section contains no reservations or exceptions. It is a present

absolute grant, *subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed.* Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms. Those lands would not be less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby."

The learned Justice, speaking for the Court, in concluding the discussion of the subject, said:

"We see no reason, therefore, for not giving to the words of present grant with respect to right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

3. It is clear, therefore, from principle and authority, upon the facts alleged in the answer, that the person, under whom the plaintiff in error claims, acquired no rights or interest whatever in the *locus in quo*, by any occupation or appropriation of the land, in 1879, under the mining laws of the United States, as against the Railroad Company, and the rights vested in it by the grant of the right of way in the act of 1866.

It appears by the answer, that the land through which that portion of the water-ditch which is alleged to have been injured by the Company, was located and dug, and is situated, was, on July 25, 1866, *public land of the United States, over and upon which the Company had the right, by virtue of the grant in the act of Congress, to locate its right of way, and build and construct its railroad and telegraph line;* that in the proper selection and location of its right of way, the Company duly appropriated the land in ques-

tion, as part of its right-of-way land; that its railroad and telegraph line was constructed thereon; and that any injury to the ditch was done in the couse of the construction and operation of that line, and not otherwise.

The answer further shows that the person under whom the plaintiff in error claims, acquired whatever right he possessed in the land, in May, 1879, by attempted appropriation and occupation of the same for the purposes of the water-ditch, under the mining law of the United States; that is to say, under the act of July 26, 1866, approved the day after the act under which the Railroad Company claims, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes." (14 Stats. 251–253.)

Upon these facts, the law adjudges, that the proprietors of this water-ditch took whatever right or interest they had in the land in question, subject to the right of way conferred, by the act of 1866, upon the Railroad Company, which, at the time it entered upon the land, had the full and complete right to the possession and use of the same for the purposes contemplated by its charter and the act of Congress.

SECOND.

If the Railroad Company failed to complete its railroad and telegraph line on or before July 1, 1880, or to construct its line over the land in question, on or before that date, such failure, on its part, did not impair or affect its rights as against the plaintiff in error, and the person under whom he claims, with respect to the land in question, under the grant of the right of way conferred by the act of 1866.

1. According to the plain terms of the act of 1866, and the principles applicable to their construction, as

has been observed, the grant of the right of way to the Railroad Company, by the third section of that act, is an absolute grant, subject to no conditions, except those necessarily implied, or which the law tacitly annexes to such easements, such as that the road shall be constructed and used for the purposes intended by the charter of the corporation, and the act of Congress.

The granted right of way could not be taken from the Company, as we apprehend, without an appropriate proceeding instituted for that purpose, and prosecuted to judgment by the United States. (Davis *v.* Gray, 16 Wall., 228; Ruch *v.* Rock Island, 97 U. S., 696.)

The eighth section of the act of 1866 provides as follows:

"That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto, as provided in section 6 of this act, or by not completing the same as provided in said section, this act shall be null and void, and all lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States."

Upon the construction of the eighth section, in connection with the plain meaning of the act, it is apparent that the conditions of forfeiture therein are annexed to the *land grant* and do not touch or affect the grant of the right of way.

If it was the intention of Congress that the grant of the right of way should be subject to the same conditions of forfeiture as the grant of the alternate sections, a breach of the conditions, in the act, would have been made to forfeit the rights of the Company under one grant as well as the other.

The grants, in the second and third sections, respectively, are distinct and independent grants.

Nowhere in the act is there any penalty or forfeiture imposed for conditions broken, which affect, in the least degree, the grant of the right of way to the Railroad Company.

The forfeiture clause is, "this act be shall null and void, and *all lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States.*"

Congress has thus fixed the penalty, and by limiting it to the forfeiture of the land grant, by express declaration, has excluded all things not mentioned.

Penalties and forfeitures are never enlarged by implication.

It seems clear, therefore, that the grant of the right of way is not made to depend upon any condition subsequent, which would render the grant liable to be defeated upon the non-completion of the railroad and telegraph line within the time mentioned in the act.

3. The words, "this act shall be null and void," in the eighth section of the act of 1866, were not intended as anything more, or to effect anything more, than the words immediately following, "and all the lands not conveyed by patent to said company * * * at the date of any such failure, shall revert to the United States."

The clause of avoidance, as it may be described, is plainly qualified by the clause of reversion, by which the unpatented lands become liable to forfeiture to the United States, in the contingency mentioned, as for a breach of a condition subsequent.

The clause of reversion thus indicates the subject to which the general words of avoidance were intended to have relation, and the intended effect of those words; as

if the section read, "this act shall be null and void, *that is to say*, all lands not conveyed by patent, etc., shall revert to the United States."

4. If the eighth section can be construed to embrace the grant of the right of way, it is clear, in that view, that the clause of avoidance had the effect simply to make the grant conditional, and that the rights of the Company remained in full force and unimpaired, unless and until the United States saw fit to enforce a forfeiture of those rights by lawful and appropriate proceedings.

Agreeably to the decision of this Court in the leading case of *Schulenberg* v. *Harriman*, (21 Wall., 62), such a clause of avoidance is, in legal effect, the equivalent of the ordinary clause of reversion, in land grant acts, and each gives rise only to a right in the Government to enforce a forfeiture for a breach of the particular condition, as a condition subsequent, by appropriate judicial or legislative action.

In that case it was contended, on the part of plaintiff in error, that the words "*shall revert to the United States*," were intended as a declaration of forfeiture in advance; but this Court, speaking by Mr. Justice Field, said:

"The provision in the act of 1856, that all lands remaining unsold after ten years shall *revert* to the United States, if the road be not then completed, is *no more* than a provision that the grant SHALL BE VOID if a condition subsequent be not performed."

A clause of avoidance, therefore, operates upon the rights of a grantee of the Government with the same, and only the same, effect as the ordinary clause of reversion. They are, as this Court said, legal equivalents of each other.

In the case of neither provision, can any individual

assail the title conveyed by the Sovereign on the ground that the grantee has failed to perform the conditions annexed.

The Interior Department, it may be mentioned, has held, upon full consideration, in reference to the eighth section of the act of July 25, 1866, that the insertion of the clause of avoidance, in that section, changed, in no respect, the *legal effect* of the provision in respect to forfeiture.

> The Central Pacific R. R. Co., successor to The California and Oregon R. R. Co. Secretary Teller, May 26, 1883.
> 2 Decisions of Interior Department Relating to Public Lands, pp. 489–492.

Mr. Secretary Teller, in that case, decided that although the California and Oregon Railroad was not completed within the time prescribed by law, as Congress had failed to declare a forfeiture, patents must issue for the granted lands, as they were earned by the construction and acceptance of portions of the road.*

5. In no view of the act of 1866, therefore, can it be deemed material, as respects the rights of the respective parties, that the time for the completion of the railroad and telegraph line had expired, if in fact it had expired, when the line was constructed over the *locus in quo*.

The plaintiff in error and his partner could not question the right of way of the Railroad Company over the land, or its right to the possession and use of the land

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*That the patenting of lands should continue, notwithstanding the right of forfeiture for condition broken, was also decided, in cases of other like grants, by Attorney-General Devens (16 Opins. Attys. Genl., 401) and Attorney-General Brewster. (17 Op., 370.)

for the purposes of its charter, and the act of Congress, upon the ground that the Company had failed to perform any condition, express or implied, which was annexed to the grant of the United States. (Schulenberg *v.* Harriman, 21 Wall., 63.)

The reserved rights of the United States, must be asserted by judicial proceedings authorized by law, finding the fact of forfeiture and adjudging the restoration of the estate, on that ground, or there must be some legislation assertive of ownership of the property for breach of the condition.

THIRD.

The deed which the Railroad Company accepted from the plaintiff in error does not estop the Company to deny his title, and assert its own rights under the grant of the right of way by Congress.

1. The demurrer to the separate defense in the answer assigns as one of its causes that the facts stated in the *complaint* estop the Company from claiming its right of way under the act of 1866.

By the demurrer the plaintiff in error admits that the *locus in quo* was on July 25, 1866, public land, *over which the Company had a right by virtue of the act of 1866 to locate its right of way and construct its road;* that it did duly locate its right of way over that land and construct its road thereon; and that any injury to the ditch was done in the construction and operation of the road, and not otherwise. (Record, p. 8, fol. 15.)

The demurrer further admits that on May 17, 1879, *long after the grant to the Company,* Fisher attempted to appropriate this "*right of way land*" of the Company to his own use under the mining laws, and thereafter con-

structed the ditch over the land; and that Bybee claims under Fisher, and never made or had any other claim to the premises than the one so derived.

The demurrer, also, admits that the Company *took nothing by the deed, as it then owned by virtue of its grant by Congress all the right and property pretended to be conveyed thereby.* (Rec., p. 9, fol. 17.)

It is more than doubtful whether the complainant can claim the benefit of the theory of *estoppel* by the *demurrer* interposed to the special defense in the answer.

The plaintiff should have set up the alleged estoppel in a replication, setting out the deed, so as to show its *contents.*

At any rate, the demurrer to the answer should have been as *special* in form as the ordinary replication of an estoppel to a plea.

But if the present demurrer is sufficient to present the question of estoppel, the comp laint must be scrutinized and upon examination it appears that it is not alleged that the deed of September 3, 1883, *contains* such a condition, or covenant, as is described in the complaint, or any condition or covenant whatever. (Rec., p. 9, fol. 8.)

It is averred that a deed was executed, "but upon the *condition* that it should," etc., and that defendants "*assented* to said condition, and *thereupon* accepted said deed, and received possession under said deed and upon said condition."

Non constat, the alleged condition was not in the deed, but was a thing outside of the deed altogether.

The complaint is not sufficient.

2. It is clear, however, that in any view of the transaction alleged or intended to be alleged in the complaint, and upon any construction or effect of the pleadings, and whether or not the deed contained such a condition or

covenant as is described, the defendant in error cannot be held to be estopped by the acceptance of that deed from asserting its prior right or title to the *locus in quo* in bar of this action of tort for damages for the alleged injury to the ditch, which the answer shows was solely the result of the due construction and operation of the railroad line on the land, as the Company's right of way land.

The rights of the Company upon the definite location of the right of way granted by Congress related back to the date of the act, and when the transaction referred to occurred the plaintiff was simply a *squatter* on the Company's premises, and his deed was useless and worthless, and the condition, therefore, was, in fact, a *nudum pactum.*

The Company had a vested right of possession in the land, and a perfect legal right to construct and operate its line over it, with the enjoyment of which Bybee and his partner had no lawful power to interfere; and there could be no consideration for any promise on its part, in the deed, or otherwise, not to obstruct or impair this encumbrance on its right of way land, in the due prosecution of its work under its charter.

The case is within the principle of the rule that a promise alleged to have been made in consideration of the release of an interest, if it appear that the promisee had in fact no interest which passed by the release, there will be no consideration for the promise alleged, and a promise in consideration of the compromise of a claim for which there is no just foundation, will not sustain a suit at law.

Nelson *v.* Robertson, 7 Ind., 531.
Jarvis *v.* Sutton, 3 Ind., 292.
Frear *v.* Hardenberg, 5 John., 277.
Ehle *v.* Judson, 24 Wend., 98.
Smith *v.* Ware, 13 John., 257.
Geer *v.* Archer, 2 Barb., 420.

Another and, perhaps, higher consideration shows that this alleged condition is void as to the Railroad Company, and imposed no duty, trust, or obligation upon it with respect to the operation of its line, and that is, that it is repugnant to, and inconsistent with, the policy of Congress in providing for the construction and endowment of the corporation, and is, in fact, contrary to public policy under the law; and the Company had no right to agree to embarrass itself in its operations by any such condition, as alleged, in connection with this deed.

"A legislative grant operates as a *law* as well as a transfer of the property, and has such force as the interest of the legislature requires."

Schulenberg Case, 21 Wall., 62.

In granting the right of way for this road over the public domain Congress did not propose that it should trammel itself in its operations by arrangements like the one alleged to have been made with reference to the plaintiff's water-ditch.

The Company would have had no right to undertake the duty or trust of protecting this water-ditch from injury or harm resulting from the ordinary construction of its road, and insure its safety for all time.

3. As the Railroad Company does not rely upon the deed in question as the source and foundation of its title, but derived its "right of way land" from the United States long before the plaintiff had any relation to the premises, it is not precluded from showing the truth in regard to the plaintiff's so-called title, and that it acquired nothing by the deed.

This is clearly the law of the case agreeably to the principles recognized by this Court, Chief Justice Marshall delivering its opinion, in *Blight's Lessee* v. *Rochester* (7 Wheaton, 535, 546), and other authorities, which show

that a party owning and claiming title to land must be permitted *to buy his peace* without prejudice to his rights.

Coakly *v.* Perry, 3 Ohio St., 344.
Ward *v.* McIntosh, 12 Ohio St., 239.
Sparrow *v.* Kinsman, 1 Comstock, 242.
Averill *v.* Wilson, 4 Barb., 187.
Ossterhout *v.* Shoemaker, 3 Hill, 518.
Holden *v.* Andrews, 38 Cal., 119.

In the light of above authorities it would seem sheer absurdity to say that the Railroad Company, holding a prior and independent title to its right of way over the land in question, by the grant of the United States, is bound, by accepting a deed from this plaintiff, by which nothing passed, because he had nothing to convey, to admit a title in him, which had no existence in reality.

This Court, at an early day, doubted the propriety of applying at all the doctrines between lessor and lessee to a vendor and vendee, and it said that if the latter is bound in law to "*admit a title which has no existence, it is not on the doctrine of estoppel that he is bound.*" (Blight *v.* Rochester, 7 Wh., 547.)

With reference to the moral policy, of the law, the Court of Appeals of New York well observed:

"The party who accepts the deed in fee of a *grantor having no title*, or a less estate than he conveys, performs no act expressly designed to influence and influencing the conduct of the latter to his injury; nor does he make any admission which, in good conscience and honest dealing, he ought not to be permitted to gainsay.

"*The fraud, if any there be, is on the part of the grantor, and the injury will fall solely on the grantee, unless he is permitted to show the truth.* There is no relation between the grantee and his grantor which will raise even an implied obligation on the part of the former against a denial of the title and estate of of the latter."

Sparrow *v.* Kingman, 1 Comst., 253.

It is submitted that the principles of common justice forbid that the defendant in error should be estopped to show that nothing passed by the deed, mentioned the in the complaint, and that any condition or covenant of the kind described therein, therefore, was without consideration and void.

FOURTH.

The judgment below should be affirmed, with costs.

J. Hubley Ashton,
Charles H. Tweed,
Counsel for Defendant in Error.